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Supreme Court, U.S.
FILED

02 793 NOV 20 2002

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID P. FJELLINE, et al.,
Petitioners,

versus

JOHN N. GRECO, et al.,
Respondents.

On Petition for Writ of Certiorari to Court of Appeal of the State of California Third Appellate District

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PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. Whether the state court violates the Supremacy clause by repeatedly instructing the jury that a farmer does not have the "right"[1] to pursue United States Department of Agriculture administrative remedies.

2 What Constitutional tort immunities protect the common man against being sued for "speech" in everyday administrative and court dispute resolution proceedings?

Is waiver of these tort immunities valid when the Slip Opinion misquotes the appellate record, leaving out words of objection?

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[1] See page 6-7 of this Petition for the quote mandating that Petitioners had no "right" to use USDA remedies.

THE PARTIES

The following are all the parties to this Petition: (1) Petitioners: David P. Fjelline, Teresa Reed Fjelline, Guy W. Foster and Linda Foster (sometimes herein "Petitioners"); (2) Respondents: John N. Greco and Mary Lorraine Greco (sometimes herein "Respondents").

No party to this Petition for Writ of Certiorari is a corporation.

TABLE OF CONTENTS

Questions Presented i

The Parties ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Statutory and Constitutional Provisions Involved 1

Statement of Case

Farmland Lease Dispute Leads Petitioners to USDA Remedy 2

Petitioners Win USDA Administrative "In Dispute" Petition 3

State Court Proceedings 4

Contract Trial 5

Mental Suffering Jury Trial 5

Mental Suffering Trial Based on USDA Administrative "Petitioning" 5

Mental Suffering Trial Based on Court Procedures 8

Petitioners' Efforts to Protect Their Constitutional Right to be Free of a Lawsuit Based on "Petitioning" Activity 12

Federal Issues Raised

"Petition for Grievance"/"Due Process" 13

Federal Supremacy 16

Reasons for Granting the Writ

The Supremacy Clause is Violated by the State Courts' Mandate to the Jury that Petitioners Had No "Right" to Use USDA Remedies 18

Important Questions Were Left Unanswered in *McDonald v. Smith* 20

The Combined Reading of *McDonald v. Smith* and *Hustler v. Falwell* Require Reversal 22

The Courts are in Disarray about *Noerr-Pennington*'s Application in Contexts Other Than Antitrust 23

Waiver of a Constitutional Right Cannot be Based on a Misquote of the Appellate Record, Leaving Out Words of Objection 27

Conclusion 30

TABLE OF AUTHORITIES

CASES *Page(s)*

Associated Bodywork and Massage Professionals v. American Massage Therapy Ass'n 897 F. Supp. 116 (N.D.Ill 1995) 20

Barker v. Wingo, 407 U.S. 514 (1972) 29

Brownsville Golden Age Nursing Home Inc. v. Wells, 839 F.2d 155 (3rd Cir. 1988) 21

Brownsville Golden Age Nursing Home, Inc. v. Wells, 839 F.2d 155, 159-60 (3d Cir. 1988) 25

California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) 23

California Teachers Ass'n v. State, 20 Cal. 4th 327 (1999) 14

De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates, 94 Cal. App. 4th 890 (2001) 14

Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085, 1087-88 (9th Cir. 1995) 25

Eastern R. Presidents Conference v. Noerr-Pennington Motor Freight, Inc. 365 U.S. 127 (1961) 23

Eaton v. Newport Board of Education, 975 F.2d 292 (6th Cir. 1992) 21

Feminist Women Health Center, Inc. v. *Mohammed*, 586 F.2d 530 (5th Cir. 1978) 21

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Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998) 19

General American Transp. Corp. v. Cryp-Trans, Inc. 897 F. Supp. 1121 (N.D. Ill. 1995) 20

Havoco of Am., Ltd. v. Hollobow, 702 F.2d 643, 649 (7th Cir. 1983) 25

Herr v. Pequea Township, 274 F.3d 109 (3d Cir. 2001) 25

Hustler v. *Falwell*, 485 U.S. 46 (1988) 22

Imig v Ferrar 70 CA3d 48 (1977) 14

In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation Lexecon, 102 F.3d 1524 (9th Cir. 1996) 24

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McDonald v. Smith, 472 U.S. 479 (1985) 20

Missouri v. *National Org. for Women*,, 620 F 2d 1301, 1317 (8th Cir. 1980) 21

New York Times v. Sullivan, 376 U.S. 254 (1964) 20

Oregon Natural Resources Council v. Mohla, 944 F.2d 531, 533-35 (9th Cir. 1991) 25

Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., 42 Cal. 3d 1157, 1169 (1986) 14

Pacific Gas & Electric Co. v. Bear Stearns & Co., 50 Cal. 3d 1118, 1131 (1990) 14

Perez v. Brownell, 356 U.S. 44 (1957) 29

Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993) 24

Romero v. Herpin, 579 So.2d 1218 (La.App. 1991) 17

Sierra Club v. Butz, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972) 25

South Dakota v. Kansas City Southern Industries Inc., 880 F.2d 40 (8th Cir. 1989) 21

State of South Dakota v. Kansas City Southern Indus., 880 F.2d 40, 50-51 (8th Cir. 1989) 25

Steffes v. Stepan Co. 114 F3d 1070 (1998) 16

United Mine Workers v. Pennington 381, U.S. 657 (1965) 23

White v. Nicholls 44 U.S. (3 How.) 266 (1845) 20

Statutes and Federal Regulations

7 USC § 7218 3

7 CFR § 1412.103 3

7 CFR § 1412.206; 3

7 CFR § 1412.303 ..... 3, 18

7 CFR 1412.401 3

USDA *Management Directives*

1-PF Amend. 252 ..... 4, 18

Miscellaneous Authorities

"*The Misapplication of the Noerr-Pennington Doctrine in Non-antitrust Right to Petition Cases*" 36 Stanford Law Review 1243, 1253 (1984). 24

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PETITION FOR WRIT OF CERTIORARI

The prayer of this Petition is to save a small-family farm, which is about to be taken from two hard-working men who spent their life savings to buy the farm. The reason - Petitioners used USDA administrative and court remedies, which Respondents claimed caused them mental suffering. Petitioners pray that a writ of certiorari issue to review the Opinion of the California Court of Appeal Third Appellate District.

OPINIONS BELOW

The opinion of the California Court of Appeal California ("Slip Opinion") was unreported and is reprinted as Appendix A. Notice of United States Department of Agriculture *in dispute* Decision is reprinted at Appendix B (p. 30A). Appendices are separately bound.

Under California Rule of Court, Rule 29(b)(2) and 27 Petitioners requested rehearing for the purpose of preserving important facts and arguments (briefed but not recorded in the Slip Opinion) for later appeal. Petitions for Rehearing are reprinted at Appendix F (p. 36A). Respondents disputed no fact or argument raised in the Petitions for Rehearing. Petitions for Rehearing denied without a hearing.

JURISDICTION

The California Court of Appeal Slip Opinion was filed May 8, 2002. The California Supreme Court denied review on July 24, 2002. On October 9, 2002, Justice O'Connor granted petitioners an extension until *November 21, 2002*, to file this petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution "Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for redress of grievance" clause, the Fourteenth Amendment "Due Process" clause, and Article VI of the United States Constitution the "Supremacy" clause are involved and are reprinted at Appendix J, p. 121A.

The applicable provisions of the Code of Federal Regulations and United States Department of Agriculture *Management Directives*, FAS 1 PF Amend. 252, which control farm subsidy division between farmland owner and renter are involved and are reprinted at Appendix J, p. 122A-126A.

STATEMENT OF CASE

A. Farmland Lease Dispute Leads Petitioners to Seek USDA Administrative Remedy

In the beginning, this case involved a farmland lease dispute between Petitioners, as farmland owner, and Respondents, as renter. The dispute is uneventful until it ended up at the steps of the USDA office and the courthouse.[2] Yet, a little understanding of the parties' dispute is necessary.

Respondents are in the business of renting several rice farms. They rented Petitioners' newly-purchased rice farm. The only rent income under the lease is 10% of the "*gross proceeds of crop.*" Appendix ("App.") 2A-4A. The parties' dispute involves the division of USDA farm subsidies, which were not mentioned in the lease. Under

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[2] The Slip Opinion finds liability on "litigation" only, holding the non-attorneys liable by ratification of "litigation" procedures. App. 28A

the 1996 Farm Bill, farm subsidies are paid, without reduction in amount, whether a crop is grown or not.[3] Because Petitioners' rent income is based on crop production, Petitioners want all the acres planted. Respondents intends to plant only half the acres but to collect farm subsidies on all the acres. App. 3A.

Petitioners asked: Doesn't the implied covenant under a crop share lease require that the farm renter plant all possible acres in order to maximize income? How can Respondents collect subsidies when he grows no crop on half of the land, leaving Petitioners with no "gross proceeds of crop" on which to compute rent?

When no crop is grown, Petitioners receive only about 20%[4] of the rent they receive if Respondents grow a crop. This occurs because "*gross* proceeds of crop" vanishes and only farm subsidies (a much small number) exist. But, Respondents are actually rewarded when they do no work.[5] Upon these fact the dispute arose.

B. Petitioners Win USDA Administrative "In Dispute" Petition

Petitioners brought their dispute to the experts -- the United States Department of Agriculture Farm Service Agency ("FSA"), which distributes farm subsidies. App. 5A-6A.

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[3] 7 USC § 7218; 7 CFR § 1412.303(b)(1); 7 CFR § 1412.206; 7 CFR § 1412.103; 7 CFR 1412.401(c).

[4] Figures in the Slip Opinion provide all necessary numbers here. The gross proceeds = $660 per acre expenses x 97.3 acres = $64,218, add back $742 loss, + USDA farm subsidy $16,400 = $81,322. When no crop is grown, rent is based on farm subsidies only $16,480; when a crop is grown, rent is based on $81,332. (App.16A, 2A.)
$16,400/$81,322 = 20%.

[5] Respondents expected loss of $742 on actual crop production shows he actually makes more doing no work at all. App. 16A.

A USDA Program Specialist heard about Petitioners' dispute and recommended that Petitioners petition the USDA to put the farm subsidies "in dispute."[6] Petitioners followed the Program Specialist's suggestion. App 5A-6A. As required under USDA law, the USDA studied the lease, past subsidy splits on the farm, and other "*available evidence.*" App. 124A-126A. The USDA rendered its Decision that Petitioners had a "*valid dispute.*" The USDA based their decision on the absence of an agreement on farm subsidy division in the lease. Petitioners won their "in dispute" petition, causing the USDA to temporarily withhold farm subsidy payments.[7] App 5A-6A, 30A, 104A Respondents' remedy was to appeal to the Washington D.C. USDA office. They filed no appeal. App. 104A.

As well, Respondent John Greco did not work the ground nor grow a crop. He barely even placed his foot upon Petitioners' farmland during the course of the lease. App. 7A, 98A-99A.

C. State Court Proceedings

Petitioners requested declaratory relief on the lease in state court (SCV 6972). In response, a flurry of cross-actions flew. Respondents' attorney filed a cross-complaint for: (1) breach of contract, (2) defamation and (3) mental suffering. Petitioners countered by amending their declaratory relief complaint to include constructive fraud. As well, they sought a speedy remedy to get their farmland back, by filing a separate unlawful detainer action. App. 6A-7A. The unlawful detainer action ended with the Court deferring its decision to to the main action SCV 6972. App. 33A-34A.

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[6] 1 PF Amend. 11, ¶252,. (Further criteria are requires for payment of farm subsidies, but they are irrelevant here.)

[7] The first half had been paid out prior to the "in dispute" petition.

(1) Contract Trial

Respondents' breach of contract portion of the case was tried by court. The trial court found Respondents' contention on water availability moot. The trial court did not respond to Petitioners' assertions that federal law was violated and that Respondents failed to exhaust USDA appeal procedures. *infra* 16-17 ("Federal Issues Raised")

The trial court ordered that Petitioners breached the farm lease by using the United States Department of Agriculture "in dispute" petition to stop the farm subsidy payment. Petitioners were thus punished in breach of contract for using USDA administrative procedures. App. 9A; 3A.

(2) Mental Suffering Jury Trial

A Mental Suffering Trial Based on USDA Administrative "Petitioning"[8]

Respondents' cross-action for defamation was dismissed as meritless. App. 7A. Respondents' cross-action for mental suffering was tried by jury. The jury determined no cause, nor were they present for any cause, except Respondents' mental suffering cross-claim. App. 9A.

Minutes into the trial, with the jury's minds still fresh with anticipation, the jury heard the following order from the Court about the law and Petitioner's use of the USDA petitioning procedure:

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[8] The First Amendment's petition for grievance clause is referred to herein as the "petition" or "petition for grievance" clause.

"PETITIONER'S COUNSEL: [T]hey had a right to put the [farm subsidy] shares in dispute?

RESPONDENT:[9] They had a right to. . . .

"THE COURT: Wait a minute. Just a moment. I don't want the jury confused on this issue. I have previously ruled that they didn't have a right to contest those funds coming from the county.[8] That's my ruling. That's what that is; that they did not have the right to contest the award of the distribution of those monies from the county agricultural office.[10]

MR. McALPIN: May we approach for a moment, Your Honor? . . .

THE COURT: No. That's what the ruling was. *That's the law. That's the law of this case.* Do they have the power to do it? Yes, they had the power. Were there procedures in effect for them do it? Yes. Were they correct in doing it? *Did they have the right to do it? No, they did not.* To make sure -- I want to make sure you're not confused on that issue. Thank you." (italics added) Reporter's Transcript ("RT") 670-671.

(The above was quoted in briefing and raised again on summarily-denied Request for Rehearing. App. 102A)

The Court gave no explanation of its statement "That's the law. That's the law of this case." The Court did not explain why it was so important that the jury

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[9] Respondent John Greco, testifying here, was a member of the governing board of the local FSA office, the "County Committee."

[10] As there never was any evidence of "monies from the county agricultural office," it was clear the Court was speaking of United States Department of Agriculture farm subsidies.

know that Petitioners had no "right" to use the USDA remedies.

During the trial, Respondents' counsel argued Petitioners' win of USDA "in dispute" procedure was loathsome conduct and an "extreme and outrageous act" such as is required under a mental suffering case.

In opening statements, Respondents counsel argued to the jury:

> "*they go to the ASCS*[11] *office in Placer County in Auburn and they say: Don't make the agricultural subsidy payment because it's in dispute.* But . . .they were all taken not related to the question of the validity of the lease, *they were taken, we think, with the intent and for the purposes of creating mental distress.*" RT 551-552.

And he argued:

> "*They froze that* [subsidy payment]. The effect of that was that Mr. Greco couldn't farm the property. Then in April to *heighten the mental distress . . .*" (italics added) RT 552. App. 50A.

Petitioners were interrogated at length in this jury trial about using USDA administrative procedures and repeatedly asked if they did not undertake these procedures to inflict emotional distress on Respondents. 758, 604-610; 712; 724; 752. Mr. Greco was asked, at the IIED trial, questions about the USDA hearing. CR 605. The cross-claim alleged the USDA "in dispute" procedure caused emotional distress. App. 50A, 103A.

In closing arguments at the mental suffering trial, Respondents' counsel argued that the USDA "in dispute" administrative procedure caused Respondent emotional distress. Respondents' counsel argued:

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[11] ASCS is the former name for USDA Farm Service Agency.

> "When that didn't work, *they tried to stop the [subsidy] payment, and did.* . . . Now, that is a factual circumstance *consistent with . . . an intent to impose mental suffering* to get their objects." RT 1088-89). App. 50A.

The Court instructed the jury multiple times that Petitioners had no "right" use the USDA "in dispute" remedy. RT 671, line 3-4; 671, line 6-8; 671, line 17-18; RT 918, line 16-17, RT 918, line 19. App. 10A, 102A. The court instructed twice that the USDA remedy could be used to show "intent," when no "intent" was relevant except "intent to inflict emotional distress." RT at 943, 918. App. 105A. Most damagingly, the state court instructed Petitioners did not have the right to use USDA remedies and "that's the law, that's the law of this case". . . . "I want to make sure you're not confused on that issue." *Supra* 6.

The Slip Opinion did not document these briefed issues and quotes. The issues were preserved by Petition for Rehearing under California Rule of Court, Rule 29(b)(2) and 27.

A Mental Suffering Trial Based on Court Proceedings

Respondent John N. Greco testified first at this mental suffering trial. Within minutes, his testimony turned to Petitioners' attorney letter stating the declaratory relief action was imminent (declaratory relief filed 8 days later). Over "litigation privilege" objection, John Greco testified that the following statement in the letter caused him emotional distress: "[we] believe that you used that knowledge to take advantage of our

predecessor, Mrs. Surmon,[12] an 83 year old widow." RT 598; 600-601. App. 72A-73A, 110A.

Next the trial turned to a letter from Petitioners' counsel to Respondents' counsel (and no one else). The letter notified Respondents' counsel of a proposed amendment (which was in fact amended). RT 601. App. 74A-75A, 113A. Over second "litigation privilege" objection, John Greco testified:

> Q So *what do you feel in your chest*?
>
> A I'm not sleeping. I'm having heart pains. . . . I got guys knocking on my door handing me subpoenas, depositions, all kind -- I don't even know what they were." (italics added) RT 610-611. App. 74A-75A.

Respondents next offer the unlawful-detainer, 3-day notice into evidence. Petitioners lodge another "litigation privilege" objection, but again the trial court overrules the objection. The required legal notice is admitted with an instruction that it can show "an overall plan" to inflict emotional distress. RT 610. App. 75A, 101A, 115A.

Respondent next sought to introduce the "results of" the actual unlawful detainer action. App. 75A. (The results of this action was that the decision was abated to SCV 6972. App. 33A, 7A.) Petitioners lodge another "litigation privilege" objection, but yet again the trial court overrules the objection. The Court admitted the "results of the actual unlawful detainer action" to show an "intention of committing or inflicting emotional distress as part of an *overall plan*." RT 614. (italics added). RT 614. App. 75A.

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[12] Petitioners inherited the lease with the sale of the land from Surmon to Petitioners (footnote not in original text).

After these overruled objections, the jury heard Mr. Greco's testimony:

> A My wife and I went to bed . . -- I woke up. . . . I kind of couldn't breathe . . . it kept getting harder and harder to breathe. I was thinking about what these people were trying to do to me and my family. So I got up and I thought: I can't breathe, and I started having a chest pain. Nothing, you know. . . . Things got worse. I got tighter and tighter and tighter. My chest was like pounding and I felt it was filling up from the inside out like blowing up, kind of just like blowing up." RT 617. App. 75-76.

And the jury heard that *what was causing* Mr. Greco stress:

John Greco: *"The fear of being sued."* RT 625. App. 76A.

During the proceedings, Respondent John Greco testified that legal mumbo jumbo, subpoenas, and different legal proceedings caused him distress. (RT 412, 598, 600, 601, 610, 619, 624, 638, 677-78, 688). He complained in detail of being served with legal process and "handing me . . depositions." And next stated "so I felt like I was being stalked" about the legal proceedings. RT 610. App. 77A.

His wife, Mary Lorraine Greco, testified that she was stressed about the litigation. (RT 800, 801). She was anxious about going to the post office because there might be more legal papers. (RT 802). She conceded that the Grecos had in turn threatened all of the Petitioners' assets (RT 811), but she did not think the legal system was set up for that *"form of negotiation."* Answering interrogatories caused her stress. (RT 810, 816). Her major complaint

was she had to live with the lawsuit every day. RT 817. App. 77A.

Respondents' counsel interrogated Linda Foster about steps she took as counsel for the cross-defendants. He asked her what her purpose in filing the action. (RT 720) He asked her about the attorney demand letter (Ex. C) and a letter between the attorneys in a lawsuit (Ex. S), which were inadmissible to show liability but admitted over objection. RT 694-702; RT 743-46. He questioned her about the allegations of the complaint, Ex. E (RT 703, 707-08, 714-16; Ex. U (RT 704-07, 719-22, 747). She was asked "so really was the lawsuit . . . designed to drive the Grecos into a settlement of this." RT 706. Question after question asked whether the litigation was instituted for the purpose of "hammering" the Grecos into submission. (RT 717). App. 77A.

All this evidence was admitted though malicious prosecution was never plead, never proven, nor was malicious prosecution ripe for pleading. The lay jury thus gave away the life savings of two hard-working men in the form of a farm ($250,000) in tort and punitive damages because Petitioners used USDA federal administrative remedies and the courts in an attempt to resolve a dispute.

The Slip Opinion did not document these briefed issues and quotes. The issues were preserved by Petition for Rehearing under California Rule of Court, Rule 29(b)(2) and 27.

D. Petitioners' Efforts to Protect Their Constitutional Right to be Free of a Lawsuit Based on "Petitioning" Activity

In limine, Petitioners' asked the court to hear the evidence prior to trial and exclude evidence from the jury's consideration, which might subject Petitioners to damages based on their use of judicial and administrative procedures. App. 58A, 88A, 107A. The Court ruled Petitioners must make their objections before the jury on a "question-by-question" basis. (CR 1560). App. 20A.

With the jury seated, Respondents' mental suffering trial began. At first opportunity to object to "petitioning" activity as proof of intent to inflict emotional distress, Petitioner's counsel sought a side bar. He sought to keep the letter notifying Respondent of the imminent lawsuit from the jury's consideration in awarding emotional distress damages. That "litigation privilege" objection was overruled, with no limitation. RT 597-598. App. 72A-73A, 110A, 5A, 23A ("suffered adverse evidentiary rulings.")

Appellant next sought to keep the letter notifying Respondent of a proposed amendment to the complaint from the jury's consideration in this emotional distress trial. That "litigation privilege" objection was denied, with no limitation. RT 601-02. App. 74A, 23A ("suffered adverse evidentiary rulings.")

Appellant next sought to keep the 3-day, unlawful detainer notice from the jury's consideration. That "litigation privilege" objection was denied. The evidence went before the jury with the following limitations:

> "[Y]ou can consider whether or not it [the three-day notice] was used *in furtherance of a plan that did not involve litigation.*" RT 610. App. 75A, 24A.

The trial court even allowed the jury to consider "service of" the three -day notice in awarded mental suffering damages:

> "I will allow the jury to consider whether or not the *service of this notice* was pursuant to *an overall objective that was not related to litigation.* RT 610. App. 75, 24A..

Appellant asked the court to keep the "results of" the unlawful detainer action out of the jury's consideration. That "litigation privilege" objection was denied. The evidence went before the jury with the following limitation:

> "You may consider, however, the *results of that action* as bearing upon whether or not the defendants had the *intention of committing or inflicting emotional distress as part of an overall plan.*" RT 614 App. 75A, 24A.

At that point, when the trial court had made it clear that even litigation itself was admissible to show an "overall plan" to inflict emotional distress, the objections ceased. Petitioners did not want to exacerbate the jury's contempt at seeing Appellants try to hide behind a privilege that the Court had ordered did not exist for Petitioners.

E. Federal Issues Raised

(1) "Petition for Grievance"/"Due Process."

Throughout the trial court proceedings Petitioners raised the "litigation privilege." Petitioners' "Answer" raised this defense and asserted "knowing falsity" must be proven. App. 120A, 127A. Petitioners claimed the "litigation privilege" numerous times in their summary judgment motion. App. 7A, 57A, 127A. In their in limine motion, Petitioners asserted "litigation privilege" barred administrative and court proceedings as evidence to

prove this mental suffering case. App. 107A-109A, 20A, 58A. They raise this issue during trial. Quotes *supra* 12-14. California case law holds that the "litigation privilege" is based, in part, on the First Amendment "petition for grievance" clause[13] and as well due process.[14] (Quotes at trial court level at App. 127A-128A.)

The trial court denied all requests that Petitioners' constitution rights under the "petition" and "due process" clauses be protected, with no substantive explanation. Every jury instruction Petitioners offered, including one under *New York Times'* knowing falsity test, were denied, with no explanation. (federal effect explained below). App. 120A.

The Court of Appeal recognizes that Petitioners raised their constitutional right under the "petition" and "due process" clauses. App. 11A, 7A, 17A-20A. (Quotes at appeals court level at App. 128A-129A.)

Though not urged by Respondent, the appellate court reasoned that Petitioners "waived" their constitutional right to keep "petitioning" activity out of the trial. App. 21A-22A. The Slip Opinion finds waiver occurred when Respondents' counsel argued that the jury should determine tort immunity for "petitioning" activity. The Slip Opinion describes the next statement in the appellate record as:

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[13] *California Teachers Ass'n v. State*, 20 Cal. 4th 327 (1999); *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d at pages 1130-1137 (1990); *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1169 (1986); and *Imig v Ferrar* (1977) 70 CA3d 48, 138 Cal Rptr 540; point out that the litigation privilege protects our "constitutional right of access to the courts."

[14] Litigation privilege violations raise constitutional due process issues. *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001); *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1131 (1990).

> ["The trial court] asked if the Landlords' counsel *had anything to add,* and Petitioner's attorney responded, "No.'" App. 21A.

In truth and fact, the appellate record shows the next statement in the appellate record as:

> *"Anything else you want to add in addition to the Points and Authorities?"* (emphasis added.) Petitioners' attorney responded "no." App. 88A.

The omitted phrase, *"in addition to the Points and Authorities"* refers to Petitioners' in limine motion. The in limine motion raises the "litigation privilege" as a complete bar to Respondents' cross-claim and asks the trial court to stop Respondents from proving his mental suffering case upon "petitioning" activity. App. 58A, 107A-109A. Because "waiver" was raised at the Court of Appeal's own suggestion which did not reveal the misquote, Petitioners were not aware of the Court's err until the Slip Opinion was filed. Petitioners requested rehearing was summarily denied.

The Slip Opinion reasons that Petitioners' above-enumerated constitutional "petitioning" objections had no effect because all this evidence was admitted not as the basis for the claim but to prove the "intent" to inflict emotional distress. App. 19-App.20. Regarding "petitioning" objections with no limiting instruction, the Slip Opinion states only "[Petitioners] suffered adverse evidentiary rulings." App. 23A. Unable to convince the trial court to protect their constitutional rights, Petitioners requested a jury instruction and verdict form, seeking to inform the jury that court and administrative procedures cannot form a basis for Respondents' mental suffering cross-claim. Under these circumstances, the Court of

Appeal found waiver in Petitioners' requested jury instruction and verdict form. App. 21A.

The Court of Appeal determined that non-libelous[15] litigation letters support Respondents' mental suffering cross-claim. (Letters are reprinted at App. 110A-119A. Only individuals to whom the letters are addressed received the letters. Petitioners wrote to Respondents other landowners asking simple questions,[16] which might help them at trial. App. 118A-119A. The trial court had ordered the names of these landowners disclosed to Petitioners in discovery. App. 31A-32A. The appeals court found the non-attorneys liable based on ratification of "litigation." The Slip Opinion found Teresa Fjelline liable, despite any evidence whatsoever that she said or did anything. The Slip Opinion states only that she is a *"co-owner of the property."* App. 28A.

The same First Amendment right to "petition for grievance" and "due process" issues were raised in California Supreme Court Petitions for Review. Citations are at Appendix at 129A-130A. These requests for review were summarily denied.

(2) Federal Supremacy.

Slip Opinion acknowledges USDA federal supremacy arguments were preserved. App. 10A.

Petitioners raised federal USDA Supremacy issues at the trial court level in their Answer (App. 130A) and their in limine motion prior to the contract trial. They asserted federal preemption, frustration of federal purpose, and failure to exhaust federal appeal remedies.

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[15] Respondents' defamation was dismissed on summary judgment.

[16] Contrary to *Steffes v. Stepan Co.* 114 F3d 1070 (1998), the Slip Opinion appears to find basis for liability on this letter.

App. 131A-132A. They raised these issues in pretrial motions. App. 132A-133A. The trial court denied all requests, with no substantive explanation.

Citations on federal issues raised to the Court of Appeal are at 134-135A. The Court of Appeal agreed with the trial court that the federal USDA "in dispute" administrative remedy constituted breach of contract. The Court cited *Romero v. Herpin* (La.App. 1991) 579 So.2d 1218. App. 11A. The Court of Appeal found no conflict with federal law. App. 10A. On request for rehearing, Petitioners pointed out that *Romero* did not involve USDA administrative remedies nor failure to exhaust federal administrative remedies. App. 41A, 44-45A, 103-104A.

Without being urged by Respondents, the Court determined that the jury understood the trial courts' repeated command, that Petitioners had no "right" to use federal procedures, applied only to the contract trial. App 25-26A. On request for rehearing, Petitioners raised the following: (1) the jury was foreign to the contract case, as it did not hear or decide the case, (2) the trial court twice instructed that USDA administrative remedies could show "intent" to inflict emotional distress; (3) and that the Court did not explain its unyielding instruction: "That's the law. That's the law of this case. . . . I want to make sure you're not confused on that issue." App. 120-103A.

The same Federal Supremacy issues were raised in California Supreme Court Petitions for Review. Citations are in the Appendix at 135A. These requests for review were summarily denied.

REASONS FOR GRANTING THE WRIT

A. Instructing the Jury that Petitioners Did not Have the "Right" to Use USDA Procedures Frustrates the Purpose of Federal Law

This Decision addresses questions important to all American farmers. If farmers utilize United States Department of Agriculture "in dispute" petitions, can they trust that they will not be penalized? That is to say, does punishing in contract, tort and punitive damages for petitioning the USDA so frustrate the purpose of farm subsidy law that the Supremacy clause of the Constitution is violated? To make this determination, a short study of relevant farm subsidy law is necessary.

For decades, the USDA has provided regulations on the division of farm subsidies between farm landowner and renter. Federal regulations provide that farm subsidies shall be paid when the parties *agree* on the subsidy division and USDA determines the subsidy division "fair and equitable." In making the "fair and equitable" determination, the USDA is required to study the lease and past history of subsidy division. 7 CFR § 1412.303 App. 122A.

When encountering a dispute on farm subsidy division, the USDA encourages landowner and renter to use a special administrative procedure, an "*in dispute*" petition. When an "in dispute" Decision is requested, the USDA is required to study the farm lease, past history of subsidy division, and other "available evidence." Upon this study, the USDA determines if "*valid dispute*" exists. When the USDA find a "*valid dispute*," subsidies are withheld. The USDA must then give notice of its Decision and give appeal rights, which are to appeal to the USDA Washington D.C. Office. USDA Management Directives 1PF 252. App. 124-126A.

"[A] private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme." *Cannon v. University of Chicago*, 441 U.S. 677, 703. "To guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the parameters of an implied right in a manner at odds with the statutory structure and purpose. See *Musick v. Peeler*, 508 U.S. at 294-297." *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998).

A state decision-making tribunal cannot instruct that USDA decision-making tribunal's decision is wrong, as it did here, resulting not only in breach of contract, but tort and even punitive damages. Though the USDA's "in *dispute*" Decision is not a resolution of the dispute, it is a complete statutory scheme. The subsidy payments are not lost but are withheld by the USDA pending the statutorily required "*agreement*" on subsidy division. 7 CFR § 1412.304(b). Appeal rights on the "in dispute" decision are given. Under this statutory scheme, the trial court could not lawfully find that Petitioners' use of USDA administrative was breach of contract. Nor could the trial court repeatedly instruct the jury that Petitioners did not have the "right" to use USDA administrative remedies and "*That's the law. That's the law of this case,*" when the only case before the jury was intentional infliction of emotional distress.

Tragically, this instruction sealed the fate of Petitioners' life savings invested in a farm. The instruction "frustrates the federal scheme" of federal administrative procedures and the farm subsidy law under *Malone v. White Motor Corp.* (1978) 435 U.S. 497, 504 and *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998). It violates Supremacy clause of the United States Constitution (Art. I § 8), and, as well, the "petition for grievance" Clause.

B. Important Questions were Left Unanswered in *McDonald v. Smith*

Outside the *Noerr-Pennington*, antitrust context, the First Amendment "petition for grievance" clause has engendered little Supreme Court analysis when compared to other First Amendment rights. Two Supreme Court cases (with a span of 140 years between them), *White v. Nicholls* 44 U.S. (3 How.) 266 (1845) and *McDonald v. Smith*, 472 U.S. 479 (1985), hold that the test for tort immunity for writings in First Amendment "petitioning" activity is "knowing falsity."

McDonald v. Smith followed *White*, but it further defined the test for tort immunity in "petitioning" speech, holding the test is the same as that under *New York Times v. Sullivan*, 376 U.S. 254 (1964), "made with knowledge of its falsity or with reckless disregard of whether it was true or false." Yet, *White* and *McDonald* have not settled the diverse decisions in the lower courts on this subject.

Many courts prior to *McDonald* found "petitioning" speech still immune from defamation. Some courts, even after *McDonald*, continued to hold that the "petitioning" speech is immune from defamation lawsuits, often citing *Noerr-Pennington*. *General American Transp. Corp. v. Cryp-Trans, Inc.* 897 F. Supp. 1121 (N.D. Ill. 1995); *Associated Bodywork and Massage Professionals v. American Massage Therapy Ass'n* 897 F. Supp. 116 (N.D.Ill 1995); *Dixon v. Superior Court*, 30 Cal. App. 4th 733.

To confuse the issue even more, the Eighth Circuit interprets *McDonald*'s "knowing falsity" test as applicable to public figures plaintiffs only. *In re IBP Confidential Business Documents*, 800 F.2d 787 (8th Cir. 1986). That is, the Eighth Circuit holds that that there are no additional tort immunities, whatsoever, for speech contained in First Amendment "petition for grievance" activity. Four justices wrote a strong dissent in *IBP*, urging that the

majority misinterpreted *McDonald* and that *McDonald* requires that the *New York Times* test be applied whenever a citizen "petitions for grievance."

In addition to defining the *New York Times* test for tort immunity here, *McDonald v. Smith* determines that absolute immunity does not apply even in non-libel "petitioning" lawsuits. But the question here is: What if falsity is not an element of the tort alleged? What if the lawsuit is, for example, intentional infliction of emotional distress, as in the case at bar?

Many lower courts conclude that various non-libel lawsuits based on First Amendment "petition" speech are immune and cannot stand. For example, in a Third Circuit case, *Brownsville Golden Age Nursing Home Inc. v. Wells*, 839 F.2d 155 (3rd Cir. 1988), allegations of civil conspiracy, interference with business relations, and malicious use of process in instituting administrative proceedings were dismissed as immune under *Noerr-Pennington*. In a Sixth Circuit case, *Eaton v. Newport Board of Education*, 975 F.2d 292 (6th Cir. 1992) allegations of the tort of outrageous conduct for statements at public hearing and in the newspaper were dismissed with a finding that the statements were constituted "classic political speech" protected under *New York Times*. In an Eighth Circuit case, *Missouri* v. *National Org. for Women,*, 620 F 2d 1301, 1317 (8th Cir.), a tort claim for intentional infliction of harm was dismissed under *Noerr-Pennington*. In another Eighth Circuit case, *South Dakota v. Kansas City Southern Industries Inc.*, 880 F.2d 40 (8th Cir. 1989), an interference with contractual relations case was stricken down, citing among other cases *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1317-19 (8th Cir. 1980). In a Fifth Circuit case, *Feminist Women Health Center, Inc.* v. *Mohammed*, 586 F.2d 530 (5th Cir. 1978),

tortuous interference with contractual relations was dismissed under *Noerr-Pennington*.

Two questions loom from this short discussion on *McDonald v. Smith* and tort immunities for non-libel lawsuits based on First Amendment "petitioning." First, how can *New York Times'* "knowing falsity" test be applied when falsity is not an element of the tort? Second, does *Noerr-Pennington* apply in the non-antitrust context?

C. The Combined Reading of *McDonald v. Smith* and *Hustler v. Falwell* Require Reversal

Hustler v. *Falwell*, 485 U.S. 46 (1988) provides important analysis. In *Hustler* a jury awarded damages for intentional infliction of emotional distress but found defamation not proven. In the case at bar, the Court dismissed defamation, but allowed Respondents' mental suffering cross-claim based upon written "petitioning" activity to proceed. Though *Hustler* is a First Amendment "speech" case, the test for tort immunity in *Hustler* is that under *New York Times* , just as is the test in the case at bar.

Hustler held that the Constitution protects against mental suffering tort claim based on First Amendment speech unless it is knowingly false under *Times*. *Hustler* found:

> "[t]he State's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that . . . is intended to inflict emotional injury when" the speech cannot be interpreted as false.

Respondents cannot pass the *New York Times* test, which was declared the correct test under *McDonald*. In fact, they cannot pass any defamation test because they

failed that test, whether public figure or private person, when their defamation action was found meritless.

The judgment in the case at bar violates the rule in *Hustler*. Our laws will not allow mental suffering damages based on litigation speech, which is not "knowingly false." The judgment in this case violates the interpretation of our United States Constitution as announced in *McDonald* and *Hustler*. Respondents could not prove the statements in litigation were "knowingly false."

Petitioners pray that this judgment be returned to the Court of Appeal to consider the combined effect of the United States Supreme Court cases, *McDonald v. Smith*, 472 U.S. 479 (1985) and *Hustler* v. *Falwell*, 485 U.S. 46 (1988).

D. The Courts are in Disarray about *Noerr-Pennington*'s Application in Contexts Other Than Antitrust

Perhaps the *Noerr-Pennington* rule is so familiar that background is unnecessary, yet a few lines of description are provided. The *Noerr-Pennington* rule generally holds that political, administrative and executive "petitioning" cannot evidence antitrust violations, as this would violate First Amendment rights of association and petition. *Eastern R. Presidents Conference v. Noerr-Pennington Motor Freight, Inc.* (1961) 365 U.S. 127 and *United Mine Workers v. Pennington* (1965) 381, U.S. 657. The *Noerr-Pennington* rule was later extended to include First Amendments "petitions for grievance" to administrative agencies and courts, at least in the antitrust context. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

An exception to *Noerr-Pennington* immunity developed. This exception was that "sham" petitioning did not come under *Noerr-Pennington* protection. "Sham"

petitioning is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If, and only if this test is passed, can the litigants' subjective motives be tested. *Professional Real Estate Investors v. Columbia Pictures Industries ("PRE")*, 508 U.S. 49 (1993).

As shown above, many cases analyze judicial dispute resolution under the *Noerr-Pennington* rule though the suit does not involve antitrust issues. Some respected legal commentators argue that *Noerr-Pennington* does not apply outside antitrust area. "The Misapplication of the *Noerr-Pennington* Doctrine in Non-antitrust Right to Petition Cases" 36 Stanford Law Review 1243, 1253 (1984). Other respected commentators argue that *Noerr-Pennington* must apply to all citizens, whether involved the antitrust context or otherwise. "Protecting the First Amendment Right to Petition: Immunity For Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine" The American University Law Review 31:147, 163-171 (1981).

In most jurisdictions, *Noerr-Pennington* is being applied equally, whether the lawsuit involves antitrust issues or other issues. But the Supreme Court has yet to speak, leaving a few courts to interpret the important issue of whether the rules protecting First Amendment "petitioning," as carved out under *Noerr-Pennington,* must be passed whenever First Amendment "petition for grievance" is invoked. Many court have commented on the disarray among the lower courts.

In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation Lexecon, 102 F.3d 1524 (9th Cir. 1996) states:

> "There is now extensive case law on both sides of the question whether the *Noerr-Pennington* doctrine brings first amendment principles to bear on state law tort

> claims." citing *State of South Dakota v. Kansas City Southern Indus.*, 880 F.2d 40, 50-51 (8th Cir. 1989); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983; *Sierra Club v. Butz*, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972); *Florida Fern Growers, Inc. v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 569 (Fla. 1993).

The Ninth circuit noted that the application of *Noerr-Pennington* to state law claims has been unpredictable. For example, the PRE objective baselessness standard was not applied in a libel suit. PRE was said not to be on point. *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1087-88 (9th Cir. 1995). But a timber company counterclaim against an environmental organization for abuse of process, based on that organization's efforts to enjoin logging on the timber company's land, was required to meet the heightened pleading standard associated with *Noerr-Pennington* . *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533-35 (9th Cir. 1991).

Herr v. Pequea Township, 274 F.3d 109 (3d Cir. 2001), notes that many jurisdictions apply *Noerr-Pennington* to state tort claims, but there is no Supreme Court rule:

> "Since *PRE*, the courts of appeals have frequently held that the restrictions on liability under *Noerr-Pennington* are applicable to liability under state tort laws." citing *State of Missouri v. National Organization of Women*, 620 F.2d 1301, 1318-19 (8th Cir. 1980); *Video Intern Productions, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-46 (7th Cir. 1977)."

The question about *Noerr-Pennington,* which this case raises is common to many other cases. That question involves whether or not *Noerr-Pennington's* "sham" test must be applied. Had the *Noerr-Pennington's* "sham" test been applied when Petitioners requested in limine and in summary judgment that Respondent be barred for proving his mental suffering case upon "petitioning" activity, Respondent couldn't have proven his case. The United States government rendered a Decision that Petitioners had a "valid dispute," and, thus, farm subsidy payments would be withheld. This "valid dispute" Decision severs the lifeline of Respondents' mental suffering action because Respondents' mental suffering cross-claim is inextricably tied to the dispute over USDA farm subsidies.

As shown above, Respondents' counsel argued throughout trial that *"stop[ping] the [subsidy] payment"* showed an *"intent to impose mental suffering." supra* 7-8 On receiving the USDA decision "valid dispute" Decision, Petitioners sought the return of their land, which Respondent would not farm, in an unlawful detainer action. Over objection, the Court allowed the 3-day unlawful detainer notice, service of the notice and even the results of the action into evidence to show an "intention of committing or inflicting emotional distress as part of an *overall plan.*" This evidence should not have been admitted because Petitioners' dispute over subsidy division was "valid." The dispute was not a "sham," as it was held to be exactly the opposite by the United States Department of Agriculture.

On these facts, Petitioners pray that Writ of Certiorari issue to determine the application of *Noerr-Pennington's* "sham" test in non-antitrust "petition for grievance" activities.

E. Waiver of a Constitutional Right Cannot be Based on a Misquote of the Appellate Record, Leaving Out Words of Objection

The Slip Opinion (without Respondents' urging) found Petitioners waived their constitutional right to keep "petition for grievance" activities out of the trial. The Slip Opinion found waiver in Petitioners' counsel's response, "no." But the Slip Opinion fatally misquotes the question preceding the "no" response, though the correct quote is printed in the appellate transcript. By that misquote, the Slip Opinion omits the very objection, which halts any finding of waiver of First Amendment "petition" rights.

The statements at trial upon which the Slip Opinion finds waiver are as follows. Respondents' counsel suggested that all litigation procedures should be presented at the mental suffering trial for the jury's determination as to what is protected and what is not. The Court of Appeal states the following came next:

> "[the trial court] asked if the Landlords' counsel *had anything to add.* Petitioners' counsel: "no." App. 21A.

In truth and fact, as the appellate transcript shows, the following came next:

> Trial Court: *"Anything else you want to add in addition to the Points and Authorities?"* App 88A.
>
> Petitioners' counsel: "no."

The Slip Opinion omits the phrase *"in addition to the Points and Authorities."* The "Points and Authorities" clearly state Petitioners' objections. The Slip Opinion's omission renders a completely different meaning. With the phrase, the meaning is: "no, I'll stand by the requests in my points and authorities." Court

Record ("CR") 1501-1503. Petitioners ask in the "points and authorities" that Respondents be stopped from proving their mental suffering cross-claim based on constitutionally-protected dispute resolution procedures. ("Points and authorities" reprinted at App. 107A; transcript quoted in summarily denied Petition for Rehearing. App. 88A)

With the phrase, "*in addition to your points and authorities,*" as in fact was in the printed appellate transcript, waiver cannot be found. [17] The misquote turns the meaning of the "no" response up side down.

Petitioner believes a host of problems arose because of this misquote. Instead of documenting Petitioners' objections at trial, the Slip Opinion states that Petitioners "suffered adverse evidentiary rulings." It neglects to document that Respondent was allowed to present as outrageous conduct serving legal papers, sending out interrogatories, giving notice of a lawsuit, corresponding with witnesses whose names the Court had ordered disclosed, and undertaking federal administrative remedies. The Slip Opinion neglects, perhaps due to the finding of waiver, to quote the trial court's repeated instructions to the jury that Petitioners' did not have the "right" to use United States Department of Agriculture administrative remedies and "that's the law of this case" and "I want to make sure you're not confused on that issue."

Due process requires that the courts indulge every reasonable presumption against waiver, and they should

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[17] Petitioners were not even aware, nor did they have reason to be aware, that the Court of Appeal was analyzing waiver based on error until the Slip Opinion was issued with the misquote was revealed. Petitioners sought rehearing, preserving this issue for later appeal. Rehearing was summarily denied.

not presume acquiescence in the loss of a fundamental right. *Barker v. Wingo*, 407 U.S. 514 (1972). Waiver of a constitutional right must be voluntary. *Perez v. Brownell*, 356 U.S. 44 (1957).

Petitioners pray that the case be returned to the Court of Appeal to correct this err, as it resulted in a finding of waiver of Petitioners' fundamental constitutional right to be free of lawsuits based on First Amendment "petitioning," and that the Court of Appeal be required to consider waiver of Petitioners' constitutional "petition" and "due process" rights based upon the actual words contained in the appellate record.

CONCLUSION

Without question, Petitioners had every "right" to use United States Department of Agriculture administrative procedures. The Supremacy Clause was violated by this instruction. And Petitioners had every right to enter the courthouse doors seeking to resolve their farmland dispute before the Courts. Serving required legal notices, writing attorney letters to opposing counsel in pending litigation, requiring that interrogatories be answered, asking simple "questions" of prospective witnesses whose names were disclosed in discovery, and filing a lawsuit is not outrageous nor is it despicable This system is not evil and it is not a "Saddam Hussein" tactic, as Respondent asserted. App 6A. This is our dispute resolution system in United States of America, a system we inherited from England, a system designed to prevent justice by the biggest gun.

Engaging in litigation and hammering out the laws of our nation is not "polite." Instead, it is sometimes tedious, sometimes aggravating, sometimes frustrating

and always fraught with never-ending, backbreaking conflict. But the laws, which result, are the backbone of our nation. The ability to vigorously pursue our rights should not impinged, and always second-guessed. As *Briscoe v. LaHue (1983)* 103 S. Ct. 1108 states: "the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible."

Petitioners pray that Writ of Certiorari issue to review the effect of the trial court's mandate that Petitioners had no "right" to pursue USDA remedies and to settle the law amongst the jurisdictions on tort immunities under our First Amendment "petition for grievance" clause and the "due process" clauses. Alternatively, Petitioners respectfully pray that this case be returned to the California Court of Appeal Third Appellate District for further proceedings regarding waiver under the actual statement made instead of the erroneously quoted question, to consider the case in light of *Professional Real Estate Investors v. Columbia Pictures Industries ("PRE")*, 508 U.S. 49 (1993), and to consider the case in light of the combined effect of *Hustler* v. *Falwell*, 485 U.S. 46 (1988) and *McDonald v. Smith*, 472 U.S. 479 (1985). Petitioners pray that their constitutional right to "petition for grievance" not be impinged.

Respectfully submitted,

/s/ Linda Foster

Linda Foster

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID P. FJELLINE, et al.,

Petitioners,

versus

JOHN N. GRECO, et al.,

Respondents.

On Petition for Writ of Certiorari to Court of Appeal of the State of California Third Appellate District

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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137 pp

TABLE OF APPENDICES

Appendix A – Court of Appeal Slip Opinion under Rule (i)(i) 1A

Appendix B - United States Department of Agriculture "*in dispute*" Determination under Rule (i)(ii) 30A

Appendix C – Order That Respondent Disclose Names of His Other Landowners under Rule (i)(ii) 31A

Appendix D – Unlawful Detainer Judgment under Rule (i)(ii) 33A

Appendix E – Ruling on Petitions for Rehearing under Rule (i)(iii) 35A

Appendix F - Petitions for Rehearing under Rule (i)(vi) (preserving important facts and issues briefed but unreported under California Rule of Court, Rule 29(b)(2) and 27) 36A

Appendix G – In Limine "Points and Authorities under Rule (i)(vi) 107A

Appendix H – Letters under Rule (i)(vi) 110A

Appendix I – Requested "Knowing Falsity" Instruction under Rule (i)(vi) 120A

Appendix J – Federal Legal Authorities under Rule 14 (1)(f) 121A

Appendix K - Issues Raised in Lower Courts and Rulings Thereon under Rule 14 (1)(g) 127A

APPENDIX A
Court of Appeal Slip Opinion
Rule (i)(i)

FILED
Court of Appeal Third District
California Court of Appeal
Third Appellate District
MAY 8 2002

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

DAVID P. FJELLINE et al., *Plaintiffs, Cross-defendants, and Appellants,* v. JOHN N. GRECO et al., *Defendants, Cross-complainants, and Respondents.*	C035835 (Super.Ct.No. SCV 6972)

In this case, a lease dispute between plaintiffs and cross-defendants David P. Fjelline, Teresa Fjelline, Guy William (Bill) Foster, and Linda Foster (collectively, the Landlords), and defendants and cross-complainants John Nick Greco and Lorraine Greco (the Tenants), over division of a $16,480 federal rice subsidy escalated to include tort claims, and resulted in judgment against the Landlords for $283,029.50 plus costs.

On appeal from the order denying their motion for judgment notwithstanding the verdict and the judgment, the

Landlords argue: (1) as a matter of federal law, they did not breach the crop share lease; (2) binding them to custom and usage based on superseded federal law was reversible error; (3) the award of lost profits was excessive as a matter of law; (4) the court should have dismissed the cross-complaint for intentional infliction of emotional distress; and (5) the damage award was excessive. We affirm the judgment with modifications.

FACTUAL AND PROCEDURAL BACKGROUND

In the fall of 1997, 87-year-old Louise Surmon contacted real estate agent John Holland about selling her 156-acre farm in Lincoln. The farm had 97.3 acres of rice base eligible for federal support payments. Surmon, who lived in Southern California, relied on her former tenant, Wilmot Brown, to take care of matters in Lincoln. Brown suggested Nick Greco might be interested in farming the property while Surmon waited for a buyer.

Greco has a masters degree in agricultural science. At the time of trial, he leased land and grew rice on about 10 farms in the Lincoln area. Greco tried to tailor his acreage to maximize his share of rice subsidies, and his efforts were successful between 1994 and 1998. Greco was also a long-time board member of the Farm Services Agency (FSA) in Auburn.

Surmon and Greco executed a three-year lease of 97.3 acres on November 18, 1997. The lease gave Surmon 20 percent of the "gross proceeds from all crops grown." Greco did not tell Surmon or Holland that under the 1996 farm bill, Surmon was entitled to receive the federal subsidy on the 97.3 acres upon expiration of the prior lease with Brown.[1]

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[1] "The Federal Agriculture Improvement and Reform Act of 1996 (1996 Act) provides producers on farms with 1996 . . . rice crop acreage the opportunity to enter into Production Flexibility Contracts with the Commodity Credit Corporation (CCC) for the years 1996 through 2002." (7 C.F.R. § 1412.101 (2001).) The regulations state that "[a] landowner

The Landlords expressed interest in buying Surmon's property with no more than a one-year lease. They were not farmers, but wanted to own farmland. Dave Fjelline was a wildlife specialist for Placer County who had lived in Lincoln for 49 years. Bill Foster was co-owner of an auto parts business. Linda Foster was a licensed attorney who worked as an accountant.

Greco agreed to a one-year lease on the condition his share be increased from 80 to 90 percent. Holland told Dave Fjelline that the Landlords would receive about $6,000 a year in income from a three-year lease, and Fjelline assumed a one-year lease would generate $3,000. On or about December 1, 1997, Surmon executed a one-year lease with Greco. The new lease, which is the subject of this lawsuit, provided: "The lessor shall recieve [sic] 10% of the gross procedes [sic] from all crops grown on the land . . . ." The Landlords purchased the Surmon property on December 30, 1997. At that time, they were unaware the land was eligible for federal subsidies.

Dave Fjelline and Bill Foster went to the FSA office in Auburn on January 8, 1998, and learned for the first time that their property was eligible for over $16,000 in rice subsidies. On that date, Yarda Hansen of the FSA had Fjelline and Foster sign a production flexibility contract (PFC) which gave them 100 percent of the federal funds.

The parties disagree on what occurred at the first meeting between Dave Fjelline and Nick Greco at Lupita's Restaurant in Lincoln on January 14, 1998. Fjelline testified he planned to discuss how they were going to work together. He raised division of the crop subsidy, and Greco said it was already covered under the lease provision that referred to gross proceeds. When Greco informed Fjelline he intended to farm only half of the leased acreage, Fjelline asked him to farm all of it. Greco insisted there was insufficient water to grow rice on the entire 97.3 acres, and

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may receive up to 100 percent of the contract payment if no lease exists with respect to the contract acreage." (7 C.F.R. § 1412.303(b)(1) (2001).)

advised Fjelline to see his attorney if he wanted anything changed. Greco testified that Fjelline wanted the entire crop subsidy, and told him to get off the property. According to Greco, Fjelline demanded he cooperate, or "we're going to get you."

Fjelline approached Greco again the following morning at Wilmot Brown's house, and talked about a buy-out. Greco became agitated, but eventually agreed to come up with a price. He suggested that Fjelline get back to him in a couple of weeks. Greco believed Fjelline was stalking him by stopping at Brown's house.

Meanwhile, Hansen telephoned Bill Foster on January 14, and told him the Landlords would have to sign a new PFC based on the lease terms. The two men went to the FSA office on January 15. The staff informed them that the property owners were not entitled to receive 100 percent of the subsidy under the regulations. Moreover, if they failed to sign the new PFC that day, Greco would receive no money for spring planting. Fjelline and Foster signed the new PFC under protest, based on the 90/10 percent split of gross proceeds set forth in the lease.[2]

Dave Fjelline discussed the proposed buy-out with the Tenants on February 14, 1998. He suggested that the Tenants calculate their labor and other costs, and "they would tack on a thousand for their trouble and that [the Landlords] would pay them for that and be done." Lorraine Greco gave Fjelline the utility bills to pay, believing that an agreement was near.

Anticipating a declaratory relief action, Linda Foster wrote to Nick Greco on March 3, 1998, as the representative of "Guy W. Foster, [herself], David Fjelline and Theresa Fjelline . . . ." She described what she viewed as areas of

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[2] The Tenants repeatedly state on appeal that Dave Fjelline and Bill Foster signed the January 15, 1998 PFC under penalty of perjury. However, the admonition regarding fraudulent representations did not appear on the PFC itself, but on page four of an appendix to the PFC. Fjelline and Foster testified they did not receive a copy of the appendix when they signed the PFC on January 15, 1998.

uncertainty in the lease. Commenting on custom and trade usage with regard to providing for division of rice subsidies in the lease, Foster stated: "... Farm Services Agency has provided us with a sample lease agreement, and that lease agreement contains explicit provisions regarding government program payments. I understand that you are on an advisory committee which reviews farm leases and advises regarding the fairness of such leases. As such, you more than almost anyone else know that prudence would dictated [sic] that government program payments be provided for in the lease. We believe that you used that knowledge to take advantage of our predecessor, Mrs. Surmon, an 83 year old widow." While assuring the Tenants she and her clients were not attempting to rescind or repudiate the lease, she stated: "What we intend to do is to institute an action against you to obtain a determination of the Court as to who gets the government program payments and who has rights to the water. If we win, we will enforce our judgment against your assets."

The Tenants retained an attorney who suggested Linda Foster contact Verna Gordon and David Shat at the FSA in Sacramento to confirm that the subsidy split was the same as the crop split. Gordon, a 28-year employee of the Department of Agriculture, told Bill Foster that he could sign a PFC with disputed shares. She explained such action would tie up the advance payment, but was appropriate if the lease did not provide for division. Gordon learned that the Landlords had not been advised of their right to put the shares in dispute. She faxed Foster a copy of the relevant regulations.

Linda Foster wrote the Tenants' attorney on March 11, 1998, about the information received from Shat and Gordon. She confirmed the Landlords intended to file the action for declaratory relief, but stated the $4,000 settlement offer remained open. The complaint, filed the same day on behalf of the Fjellines and Fosters, sought a declaration by the court that the lease was unenforceable due to uncertainty, or, in the alternative, the court's interpretation

of the lease with regard to division of the rice subsidy, rights to the well water, and the Tenants' obligation to farm all of the land they leased.

Meanwhile, a follow-up letter from the FSA office in Auburn on March 20, 1998, informed the parties: "According to information provided by our state office you may dispute the shares in your contract as the lease does not stipulate how the PFC payments will be distributed. Because the shares are now in dispute, please be advised no further payments will be issued until the dispute is settled. The County Committee may not settle division of payment disputes; however, they may assist by providing suggestions. Let me reiterate, if the dispute is not settled, further payments will not be issued." Bill Foster filed the paperwork necessary to initiate the administrative proceedings. The Placer-Nevada-El Dorado Area FSA committee set a hearing on the dispute on April 8, 1998. It ultimately recommended that the parties split the payment 90/10 on the planted acres, and 50/50 on the unplanted acres.

By letter dated March 27, 1998, counsel for the Tenants informed the Landlords they planned to file a cross-complaint seeking general and punitive damages based on "a series of acts which were designed to deny the existence of a contract and to bludgeon the [Tenants] by embarrassment and threats into foregoing the benefits of the lease . . . ." Counsel observed that "[i]t seems unlikely that an American jury in Auburn, California is going to appreciate this example of the Saddam Hussein School of Negotiations, and I particularly must say that it is my duty as an attorney to make sure that you never attempt this type of behavior on any other individuals." He continued, "These are exactly the type of cases which we find most rewarding. A member of our firm was named 'Trial Lawyer of the Year' a decade ago for pursuing cases of this nature through the Supreme Court, . . ."

The Tenants' cross-complaint, filed April 22, 1998, alleged breach of contract, defamation, and intentional

infliction of emotional distress. The Landlords answered, asserting, among other defenses, that the alleged wrongful conduct was absolutely privileged.

On April 22, 1998, the Landlords filed a separate action for unlawful detainer. (Fjelline v. Greco (Super. & Mun. Cts., Placer County, 1998, No. MCV 4146).) The complaint alleged the Tenants had agreed to cancel the lease, but refused to farm or return possession of the property. The court ruled on May 14, 1998, that the Landlords take nothing because the same dispute was the subject of the pending action for declaratory relief.

On May 13, 1998, the Landlords filed a first amended complaint which added causes of action for breach of agreement to rescind the lease, and constructive fraud.

Meanwhile, Nick Greco planted nothing. He testified at trial that he was prevented from planting by the rains, the litigation, and the threat to his contract payment income. The Tenants claimed and ultimately received crop insurance proceeds in the amount of $8,612, due to rainy conditions.

Linda Foster wrote the Tenants on September 5, 1998. The letter included the following language: "At trial Mr. Greco's business practices will be fully exposed. Mr. Greco is already known as a hot-headed, hard to deal with individual. If Mr. Greco intends to stay in business, he needs to give some serious thought to how this lawsuit is further damaging his reputation in the community. If Mr. Greco loses the lawsuit (or even if he wins), he may find few, if any, landowners who will give him the opportunity to farm."

In November 1998, the Landlords moved for summary adjudication of the Tenants' causes of action for defamation and intentional infliction of emotional distress. They cited the litigation privilege (Civ. Code, § 47, subd. (b)), and lack of evidence of publication in support of their motion. The court granted summary adjudication on the defamation claim, finding no evidence of defamatory statements made by the Landlords. It also ruled that there remained triable issues of fact with respect to the claim for

intentional infliction of emotional distress which were not dependent on the defamation cause of action.

Trial was originally scheduled to begin on January 20, 1999. On January 8, Linda Foster mailed a questionnaire to Nick Greco's other landlords.[3] Her stated purpose was to "gather information about Mr. Greco's other farm leases." The cover letter also assured the landlords that "[w]e are not trying to involve you in our lawsuit but merely trying to gather facts about Mr. Greco's farming practices." At trial, Foster testified that she "wanted to know for the fraud cause of action whether or not [Greco] was letting his landowners know that the beginning point in negotiating a lease is the subsidy amount, because they have the right to take that subsidy and not farm at all." Foster explained they contacted the landlords "for the same purpose [they] contacted those defamation witnesses which all said there had been no defamation."

Claims set forth in the first amended complaint for declaratory relief and the cross-complaint for breach of contract were tried by the court from June 17 to June 23,

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[3] The questionnaire consisted of eight "yes" or "no" questions:

"1. Do you know how much the total government farm subsidies were on your property in 1998? [¶] . . . [¶]

"2. Do you know that a supplemental government farm subsidy, increasing the farm subsidies in 1998 by an additional 49%, was awarded in 1998? [¶] . . . [¶]

"3. Do you know if the income you received on your property in 1998 exceeded the total government farm subsidies? [¶] . . . [¶]

"4. Are you aware that under the current Farm Bill, effective 1996 through 2002, you do not have to farm the property to collect government farm subsidies? [¶] . . . [¶]

"5. Are you aware that when a lease expires on your farm property, and you maintain control of it, you can collect the entirety of that government farm subsidy without farming?[] [¶] . . . [¶]

"6. Did John Greco raise a crop on your farm in 1998? [¶] . . . [¶]

"7. Did John Greco farm all the acres he had rented from you in 1998? [¶] . . . [¶]

"8. Do you know if John Greco collected any crop insurance for not farming any part of your property in 1998?"

1999. At the close of the Landlords' case, the court granted their motion for leave to amend to state a cause of action for breach of contract. The Landlords dismissed their cause of action for constructive fraud.

The court found in favor of the Tenants on all causes of action relating to the lease. Specifically, the court ruled that the lease was not ambiguous in light of custom and practice. It also found that the Landlords "were negligent and failed to perform any reasonable investigation of the subjects now contended to be vague and uncertain." The Tenants, said the court, "did everything reasonably required of a Tenant under these circumstances." On the Tenants' cross-complaint for breach of contract, the court ruled that "the actions of the [the Landlords] in disclaiming the lease terms and payment of the USDA subsidy in the 90%/10% ratio under the January 15, 1998 Production Flexibility Contract with the Department of Agriculture constituted an anticipatory breach of the lease." It assessed contract damages in the sum of $33,029.50.

Thereafter, the Landlords urged dismissal of the cause of action for intentional infliction of emotional distress, unsuccessfully moving for judgment on the pleadings. This court denied their petition for writ of mandate.

Jury trial began on December 14, 1999, on the Tenants' cross-complaint for intentional infliction of emotional distress. The jury returned a verdict in favor of the Tenants, awarding damages to Nick Greco in the sum of $120,000, and to Lorraine Greco in the sum of $30,000. The jury also awarded punitive damages in the amount of $25,000 against each cross-defendant separately, for a total of $100,000. The judgment against the Landlords totaled $283,029.50 plus costs.

The Landlords moved for judgment notwithstanding the verdict, and for new trial. The court denied the posttrial motions, and this appeal ensued.

DISCUSSION

I

The Impact of Federal Law on the Contract Claims

At the close of the second phase of the trial, the court instructed the jury on the issues it had decided in the first phase of the trial: "When the Fosters and Fjellines were assigned that lease when they bought the property, they were bound by both the rights and obligations which that lease imposed. [¶] The challenging of the federal subsidy payment by the Fosters and Fjellines was a violation of the lease agreement, and was a breach of their contract with Mr. Greco. This is so, even though AFCS procedure allowed for such a challenge. [¶] As I previously instructed you, the Fosters and Fjellines had the power to challenge the allocation of the subsidy payment, but they did not have the right to do so." (Emphasis added.)

The Landlords argue these instructions demonstrate the court punished them in the breach of contract action for exercising their federal statutory and constitutional rights. Citing 15 United States Code section 714b(g), they insist "[f]ederal law trumps inconsistent state law." There is no merit in this argument.

We begin by emphasizing that the subject of this appeal – that is, the amended complaint and cross-complaint seeking declaratory relief and damages for breach of contract -- involves interpretation of the Tenants' lease with the Landlords, not the PFC executed by the parties and the Commodity Credit Corporation (CCC), a corporate body created within the United States Department of Agriculture to stabilize, support and protect farm income and prices. (15 U.S.C. §§ 714, 714b.) Whether the "gross proceeds" provision of the lease included the rice subsidy was a question of state law. The Landlords do not argue otherwise.

We also reject the Landlord's suggestion that the common law of contracts applied in this case is somehow inconsistent with 15 United States Code section 714b(g). The statute describes the general powers of the CCC, including

the following powers relating to contracts: "The [CCC] [¶] . . . [¶] (g) May enter into and carry out such contracts or agreements as are necessary in the conduct of its business, . . . State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements." Nothing in the language of the PFC signed by the parties on January 15, 1998, and April 8, 1998, or in the appendix to those forms, declared California law inapplicable. Nor do the Landlords identify any "[s]tate or local regulatory laws or rules" that are, in fact, inconsistent with "such contract or agreements," here, the PFC.

The Landlords' claim that they were unlawfully barred from exercising their constitutional right to seek administrative redress mischaracterizes what occurred. The Landlords were not prevented from placing the shares in dispute. However, their election to take that step, thereby stopping the subsidy payments to the Tenants, constituted a breach of the lease. (See, e.g., Romero v. Herpin (La.App. 1991) 579 So.2d 1218 [landlord's refusal to sign tenant's application to enter federal farm subsidy program constituted a breach of the agricultural lease].)

"Ordinarily, a breach is the result of an intentional act, . . ." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 791, p. 715.) The concept of economic breach – that a party should be free to breach a contract when it is economically rational or "efficient" to do so – provides a modern theoretical basis for contract remedies. (See Posner, Economic Analysis of Law (5d ed. 1998) p. 130.) Here, it appears the Landlords decided it was economically advantageous for them to place division of the subsidy in dispute. However, their use of FSA procedures in breaching the lease does not excuse them from fully compensating the Grecos for damages suffered as a result of the breach. "The duty to keep a contract at common law means a prediction

that you must pay damages if you do not keep it, . . ." (Holmes, The Path of the Law (1897) 10 Harv.L.Rev. 457, 462.) Thus, in this context, the trial court's statement to the jury meant that "the Fosters and Fjellines had the power [under federal law] to challenge the allocation of the subsidy payment, but they did not have the [contract] right to do so." We conclude there was no error.

II

Custom and Usage

As we explained, the court found that the lease was unambiguous and certain that "the 'crop proceeds' referred to in the lease to be divided 90% to the tenant and 10% to the landlord refer[red] to the Department of Agriculture subsidy and support payments as well as to rice grown upon the property." It also found that "[t]he fact that the payment of the subsidy could be made to land not farmed [did] not change the fact that the crop subsidy was part of the crop proceeds in the understanding of the parties to the lease, Mr. Greco and Mrs. Surmon, but also [was] a custom in the area."

The Landlords contend evidence pertaining to custom and usage was irrelevant given controlling federal law – the 1996 farm bill – which allowed landlords to claim the rice subsidy without farming the land. They also argue they cannot be bound by custom and usage of which they had no knowledge, the claimed custom and usage was based on outdated federal law, and, in any event, there was no evidence Surmon was aware of or intended to be bound by the claimed custom and usage. We reject these contentions.

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636; Houge v. Ford (1955) 44 Cal.2d 706, 713.) "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." (Civ. Code, § 1647.)

The Landlords argue the evidence of custom and usage was irrelevant and inadmissible because it was

"contrary to the controlling federal law." We question the extent to which federal regulations regarding eligibility for crop subsidies "controlled" the court's interpretation of the lease provisions. The Landlords do not, and cannot claim that the 1996 farm bill required landlords to stop leasing their land, and claim the entire crop subsidy when a lease expired. The applicable regulation states: "A landowner may receive up to 100 percent of the contract payment if no lease exists with respect to the contract acreage." (7 C.F.R. § 1412.303(b)(1) (2001), emphasis added.)

Citing Swenson v. File (1970) 3 Cal.3d 389, 393, and Miracle Auto Center v. Superior Court (1998) 68 Cal.App.4th 818, 821, the Landlords insist contracting parties are presumed to know and to have in mind all applicable laws in existence when the agreement was made, specifically, the 1996 farm bill. As we explained, 7 Code of Federal Regulations section 1412.303(b)(1), supra, addressed the situation where the property entitled to the subsidy is not leased. The regulation did not negate Surmon's and Greco's intent to split the rice subsidy in accordance with custom and usage once Surmon decided to lease the property. At most, the existence of the regulation raised questions which the Landlords sought to address in their cause of action for constructive fraud.

Under the rule of conflicting evidence, we "must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in [the Supreme Court], to be resolved in favor of the finding." (Bancroft-Whitney Co. v. McHugh (1913) 166 Cal. 140, 142.) Here, there is substantial evidence to support the court's finding that Surmon and Greco intended at the time the lease was executed that the rice subsidy be included in the division of crop proceeds.

A videotape of Surmon's deposition testimony, which was played at trial, showed she wanted the property

farmed in the same way Brown had farmed it. She was aware of receiving government payments over the years, but did not know how the payments worked. Surmon indicated she and Brown always divided the government payment on the same basis as the crop split. She did not know at the time she leased the farm to Greco that if she let the ground go idle, she could collect the full subsidy herself. Greco testified he understood at the time he signed the lease that Surmon and Brown shared the subsidy and crop proceeds in the same proportion, consistent with custom in the area.

The Landlords also assert that they were not bound by Surmon's and Greco's intent to divide the subsidy in the same proportion as the crop proceeds. However, the evidence shows they were aware of the Greco lease when they purchased the property, and Fjelline assumed a one-year lease would generate annual lease payments amounting to $3,000. The Landlords do not challenge on appeal the court's factual finding that they "were negligent and failed to perform any reasonable investigation of the subjects now contended to be vague and uncertain," and that "nothing done by Mrs. Surmon or Mr. Greco caused that failure."

III

Breach of Contract Damages

The Landlords contend that even if there was a breach of contract, the damage award of $33,029.50 "was clearly in excess of [the Tenants'] expected profits and included double recovery for prevented planting on account of rain." We find no merit in the Landlords' argument, but reduce due to computation error the amount of contract damages from $33,029.50 to the $32,647.50 sought by the Tenants in exhibit P.

Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

We begin by rejecting the Landlords' claim the court should have reduced the award in the amount of the $8,612 crop insurance payment to avoid a double recovery. The Landlords do not challenge the court's finding that the insurance payment was "not sufficiently attributable" to the weather-related losses on the specific property at issue here to justify a credit, but was intended "to provide payment for overall losses suffered by the farmer in its operation." In any event, offset of payments received from an independent party such as an insurance company is barred by the collateral source rule. (Shaffer v. Debbas (1993) 17 Cal.App.4th 33, 39-40.)

In general, when one party to a contract is prevented from performing by the other party, "the primary measure of damages is the amount of his loss, which may consist of his reasonable outlay or expenditures toward performance and the anticipated profits which he would have derived from performance." (Navarro v. Jeffries (1960) 181 Cal.App.2d 454, 460.) This benefit of the bargain or expectation remedy is generally described as lost profits, which may be difficult to estimate. (Posner, Economic Analysis of Law, supra, p. 136.) Part of the difficulty is semantic, with words such as "overhead," "detriment," and "benefit" taking on different meanings when used in their technical or popular sense. (See Oakland Cal. Towel Co. v. Sivils (1942) 52 Cal.App.2d 517, 519.) However, "the true rule seems to be that the prospective profits should be diminished by charges composing an essential element in the cost of manufacture or, . . . service. Essential elements in such cost do not include remote costs, overhead or otherwise but are confined to expenditures that would necessarily have been made in the performance of the contract. The only matter of concern is the detriment suffered or benefit lost as the result of the breach. If the fixed expenses neither increased nor decreased as a consequence of the nonperformance of the contract, there would be no loss or benefit arising from that factor." (Id. at p. 520.) In the context of an agricultural lease, lost profits are net profits, or

the market price of the crop less "'all sums expended in the production or attempted production of the same, including rental and the reasonable cost of bringing the crops to maturity and marketing them.'" (Shimbori v. Coelho (1937) 18 Cal.App.2d 641, 643-644.)

The Tenants introduced exhibit P, which set forth their calculation of lost profits in the sum of $32,647.50. The $21,397.50 listed as "loss of income" included 90 percent of the original federal subsidy of $16,400, 90 percent of a subsequent federal subsidy of $8,200, less a $16.50 per acre or $742.50 loss on the rice crop. The Tenants included labor and equipment costs of $250 per acre in two places in their calculation: (1) as part of the total $660 cost of production per acre used in determining the $742.50 loss on the crop; and (2) as $11,250 "loss of equipment and labor income" added to the "loss of income from farming property" to reach the total loss of $32,647.50. Nick Greco testified that the costs of farming per acre, including his use of labor and equipment, were costs but also income that would have flowed to Tenants had no breach occurred.

The trial court apparently offset the $275 listed as per acre equipment and labor cost and the $250 listed as per acre lost equipment and labor income, stating that "[t]he inclusion of labor and equipment in the estimated costs of operation as claimed by [the Landlords] is inappropriate in that by calculation of the net profits for the actual farming of the rice, the remaining amount denominated profit is available to pay labor and for equipment use." Although we question the court's rationale, its bottom line was roughly correct.

Greco indicated that $250 of the per-acre cost of equipment and labor represented fixed costs, including depreciation. These fixed costs were not saved when the Tenants were prevented from planting rice on the leased land. Thus, the $11,250 ($250 x 45 acres) should not be subtracted from the gross profits to determine how much worse off the Tenants were as a result of the Landlords' breach. (See Posner, Economic Analysis of Law, supra, p.

136.) The Tenants included the $11,250 on both sides of their equation to achieve the same result. Greco's testimony supports the use of $250 to represent fixed costs rather than the $275 used by the court to reach the damage figure of $33,029.50. Accordingly, we conclude the correct amount of lost profits was that calculated by the Tenants as $32,647.50, and modify the judgment to reflect that determination.

IV

Intentional Infliction of Emotional Distress

The Landlords make a multi-pronged attack on the judgment against them on the cause of action for intentional infliction of emotional distress. Citing the litigation privilege set forth in Civil Code section 47, subdivision (b)(2) (the litigation privilege), they challenge the judgment and the order denying their motion for judgment notwithstanding the verdict on grounds the court erred in: (1) admitting evidence of protected conduct and litigation tactics; (2) giving the jury the question whether certain communications were within the litigation privilege; and (3) instructing the jury on the litigation privilege.[4]

We conclude there was no error. The Landlords acquiesced in a procedure that allowed the jury to determine as questions of fact whether their conduct was sufficiently related to litigation or possible litigation for the litigation privilege to apply. Having waived the error (Mesecher v. County of San Diego (1992) 9 Cal.App.4th 1677, 1685-1686), the Landlords may not challenge on appeal a procedure that resulted in admission of most, if not all, evidence claimed to be privileged, and allowed the jury to find that their conduct

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[4] The Landlords generally assert the court should have dismissed the cross-action for intentional infliction of emotional distress before the jury trial -- presumably in the motion for judgment on the pleadings. This court summarily denied the Landlords' petition for writ of mandate following the trial court's denial of that motion. (*Fjelline v. Superior Court* (Nov. 24, 1999, C034080).) The litigation privilege was not an issue in the motion.

was unprivileged.[5] We also conclude that the jury instructions were correct.

A. The Litigation Privilege:

Civil Code section 47 reads in relevant part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding, . . ." Where applicable, the privilege is absolute, and confers immunity regardless of motive. (Sacramento Brewing Co. v. Desmond, Miller & Desmond (1999) 75 Cal.App.4th 1082, 1086; Aronson v. Kinsella (1997) 58 Cal.App.4th 254, 263.)

"The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (Silberg v. Anderson (1990) 50 Cal.3d 205, 212 (Silberg).) Thus, "[t]he acts involved in filing a formal legal complaint . . . are all part of its publication, and are privileged to the extent its contents are privileged." (Financial Corp. of America v. Wilburn (1987) 189 Cal.App.3d 764, 774.) The litigation privilege is broadly applied, and "should be denied only where [the communication] is so palpably irrelevant to the subject matter of the action that no reasonable person can doubt its irrelevancy." (Sacramento Brewing Co. v. Desmond, Miller & Desmond, supra, 75 Cal.App.4th at p. 1089.)

The purpose of the litigation privilege is "to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions." (Silberg, supra, 50 Cal.3d at p. 213.) It applies to immunize defendants from tort liability based on defamation, abuse of process, intentional infliction of emotional distress, intentional inducement of breach of contract, intentional interference

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[5] Because the parties did not address the issue of waiver in their briefs on appeal, we directed them to submit supplemental briefing on that issue.

with prospective economic advantage, negligent misrepresentation, invasion of privacy, negligence, and fraud. (Id. at p. 215.) Only tort suits for malicious prosecution fall outside the litigation privilege. (Id. at p. 216.)

At issue at this trial was the sometimes difficult distinction between statements and publications, which are covered by the privilege, and conduct, which is not. "This distinction has traditionally served as a threshold issue in determining the applicability of section 47(2)." (Kimmel v. Goland (1990) 51 Cal.3d 202, 211 (Kimmel).) In Kimmel, the cross-complainant alleged it suffered injury from the taping of confidential telephone conversations by cross-defendants, not from the publication or broadcast of the information contained in the conversations. (Id. at p. 209.) The Supreme Court held that the litigation privilege did not apply to the noncommunicative act of illegally recording confidential telephone conversations for the purpose of gathering evidence for future litigation. (Id. at p. 205.) It explained that "the privilege of section 47(2) precludes recovery for tortiously inflicted injury resulting from publications or broadcasts made during the course of judicial and quasi-judicial proceedings, but does not bar recovery for injuries for tortuous conduct regardless of the purpose for which such conduct is undertaken." (Ibid., emphasis in original; compare Rubin v. Green (1993) 4 Cal.4th 1187, 1195-1196 [litigation privilege covered statements made by a law firm to mobilehome park residents in discussions on the possibility of representing them].) Classed as noncommunicative conduct outside the litigation privilege are illegal eavesdropping by an attorney (Ribas v. Clark (1985) 38 Cal.3d 355, 358, 365), and revocation of a doctor's staff privileges by a hospital (Westlake Community Hosp. v. Superior Court (1976) 17 Cal.3d 465, 482).

Moreover, Civil Code section 47, subdivision (b)(2) "bars certain tort causes of action which are predicated on a judicial statement or publication itself, [but] does not create an evidentiary privilege for such statements. Accordingly,

when allegations of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of a judicial proceeding may be used for evidentiary purposes in determining whether the individual acted with the requisite intent." (Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc. (1986) 42 Cal.3d 1157, 1168, emphasis added.)

B. Privilege as a Jury Question:

The Landlords argue on appeal that the question whether certain communications were privileged was for the court, not the jury. It is true that the question whether the communication is within the absolute litigation privilege is a question of law where the facts and circumstances under which a communication is made are undisputed. (Nguyen v. Proton Technology Corp. (1999) 69 Cal.App.4th 140, 147; Costa v. Superior Court (1984) 157 Cal.App.3d 673, 678.) Here, however, different inferences could be drawn regarding the purpose and intent of each of the Landlords' actions.

The question whether the issue of privilege should go to the jury arose during the hearing on the Landlords' motions in limine. The Landlords had raised the litigation privilege in several of their motions. They sought to exclude evidence and comment on Linda Foster's March 3, 1998 demand letter, and "litigation procedures and court hearings, unless Greco can make a clear showing that it is for a purpose, other than to obtain sympathy that Greco might have suffered emotional distress because of this action." The Landlords also wanted the court to exclude evidence that Linda Foster was an attorney. Counsel for the Tenants opposed.

The court denied the motion to limit evidence Linda Foster was an attorney. It ruled that such evidence was relevant to the Landlords' conduct, as well as to the threats allegedly made against Greco.

The court indicated it would rule on the litigation privilege on a question-by-question basis. However, the court apparently agreed with the Tenants' argument that it

was impossible to draw a fine line in advance between unprivileged conduct and privileged statements. The Landlords' counsel also acquiesced in the suggestion that the court take care of the matter with instructions, and allow the jury to "categorize the actions and determine whether or not the privilege will exonerate the [Landlords] in this case." Following the explanation by Tenants' counsel of the proposed procedure, the court asked if the Landlords' counsel had anything to add. He responded, "No." The Tenants' counsel then referred the court to a special instruction he had prepared. The record indicates the Landlords' counsel was aware of the special instruction, but made no comment concerning its language.

That the Landlords agreed that the jury should decide certain issues of fact relating to the litigation privilege is further demonstrated by the alternative jury instructions and special verdict form they proposed to the court. The Landlords' special verdict asked, as to each cross-defendant: (1) "Did cross-defendant . . . engage in outrageous, unprivileged conduct?" and (2) "Did such outrageous, unprivileged conduct of cross-defendant . . . cause the emotional distress suffered by cross-complainant JOHN N. GRECO?" (Emphasis added.) The Landlords' proposed jury instructions referenced jury findings on whether they acted in good faith, and whether their communications had a connection or logical relation to a lawsuit or administrative proceeding.

"'Under the doctrine of invited error, where a party, by his conduct, induces the commission of an error, he is estopped from asserting it as grounds for reversal. [Citations.] Similarly an appellant may waive his right to attack error by expressly or impliedly agreeing at trial to the ruling or procedure objected to on appeal.' [Citations.] There is nothing shocking about these rules. . . . Absent the need for the same constitutional protections afforded to defendants in criminal cases, there is considerable judicial deference to attorney creativity in civil cases." (Mesecher v. County of San Diego, supra, 9 Cal.App.4th at pp. 1685-1686.)

Ordinarily, we will not second-guess tactical choices made by counsel at trial. (Id. at p. 1686.)

Citing this court's decision U.S. Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal.App.3d 1431 (U.S. Roofing), the Landlords argue they are deemed to have objected to the procedure under Code of Civil Procedure section 647 (section 647). U.S. Roofing does not support their position. The appellant in that case framed its arguments on appeal by assigning error to several jury instructions, including an instruction that allowed the jury to determine whether a warranty disclaimer contained in a heavy equipment lease was unconscionable. (Id. at p. 1446.) In response to respondent's claim appellant waived the instructional error by failing to object, we concluded the issue was properly before us under the express provision of section 647, which states that "giving an instruction, refusing to give an instruction, or modifying an instruction requested" is deemed excepted to. Section 647 lists specific orders and rulings "deemed excepted to," and courts will not apply the statute in other circumstances. Thus, an order denying plaintiff's request for jury trial was not reviewable on appeal where plaintiff acquiesced in the ruling, and the order was not listed in section 647 as one to which exception was deemed to have been taken. (Allin v. Internat. etc. Stage Employees (1952) 113 Cal.App.2d 135, 138; see also Kearney v. Bell (1911) 160 Cal. 661, 671 [special issues submitted to the jury].)

Here, the Landlords challenge for the first time on appeal the procedure that allowed the jury to determine whether the litigation privilege applied. As we explain below, the Landlords' claim of instructional error focused on other matters – that the instructions on litigation privilege "materially misstated the law, was internally inconsistent, and hopelessly muddled." Submission of specific issues to the jury is not among the matters deemed excepted to under the current language of section 647.

Citing De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates

(2001) 94 Cal.App.4th 890 (De Anza), the Landlords urged at oral argument that the invited error doctrine does not apply where a party is "in a fix" not of its own making. In De Anza, the defendant mobilehome park owners challenged the jury's award of punitive damages based on their violation of Mobilehome Residency Law. (Id. at p. 894.) The complaint filed by the homeowners association alleged intentional torts in addition to the statutory violation, but the tort claims were neither argued nor proven at trial. (Id. at p. 904.) The court directed a verdict in favor of the homeowners association on the question of the statutory violation, and allowed the jury to decide whether the association was also entitled to punitive damages based on the statutory violation alone. (Ibid.) On appeal, the court addressed the question whether the park owners waived their challenge to punitive damages by submitting a proposed special verdict form authorizing the jury to make a finding of punitive damages. (Id. at p. 907.) After reviewing the record, the court noted that the purpose of the proposed verdict form was to renew an earlier contention that the jury must determine actual damages before awarding punitive damages. It concluded the park owners did not invite any error. (Id. at p. 908.) The De Anza court relied on Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 212, which explains: "the doctrine [of invited error] does not apply when a party, while making the appropriate objections, acquiesces in a judicial determination." (Emphasis added.) The record is different in the case before us. It is true the Landlords suffered adverse evidentiary rulings that allowed evidence they claimed was privileged to be introduced -- over repeated objections -- to show intent as relevant to the Tenants' claim of intentional infliction of emotional distress. At the same time, the Landlords failed to object to the procedure that allowed the jury, not the court, to decide whether the litigation privilege applied to exonerate them. Their acquiescence to the procedure may well have involved the gamble that they would fare better if the jury decided that question.

Based on a record that clearly demonstrates Landlords' acquiescence, we conclude the Landlords may not challenge on appeal the court's decision to allow the jury to determine whether the litigation privilege applied to the Landlords' conduct.

C. Admission of Evidence:

The Landlords argue the court committed reversible error in admitting evidence of their litigation tactics.[6] During trial, counsel for the Landlords objected to the admission of evidence on grounds of the litigation privilege on only three occasions. The court overruled two of the objections, and gave a limiting instruction in response to the third. In supplemental briefing, they suggest any further objection based on the litigation privilege would have been counterproductive.

The Tenants' theory of liability was that the Landlords' actions demonstrated a course of conduct, apart from statements made in the litigation, intended to cause the Grecos emotional distress and drive them off the land. We already explained that the litigation privilege does not create an evidentiary privilege, and statements made during the course of a judicial proceeding are admissible for purposes of showing an individual acted with the requisite intent. (Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc., supra, 42 Cal.3d at p. 1168.) The court clearly had this rule in mind when it allowed introduction of evidence that Linda Foster was an attorney, and evidence of the outcome of the unlawful detainer action. We conclude

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[6] The Landlords' claim of error focuses on the introduction of the following evidence at trial: (1) Linda Foster's March 3, 1998 demand letter; (2) the Landlords' March 11, 1998 complaint for declaratory relief; (3) lengthy questioning of Linda Foster on the steps she took as counsel for the Landlords; (4) placing the shares of rice subsidy in dispute with the FSA; (5) filing the action for unlawful detainer; (6) Linda Foster's September 5, 1998 letter to the Tenants' attorney; and (7) the January 1999 letter and questionnaire to the other landlords from whom the Tenants leased farmland.

the evidence challenged by the Landlords was relevant, and properly admitted to show the Landlords' intent.

We also consider the impact of allowing the jury to address factual issues relating to the distinction between privileged statements and publications and unprivileged conduct, traditionally a threshold issue in determining whether Civil Code section 47, subdivision (2) applies. (Kimmel, supra, 51 Cal.3d at p. 211.) The court indicated it would rule on the litigation privilege on a question-by-question basis during trial. We assume this means the court would have excluded evidence covered by the litigation privilege as a matter of law. We also assume that by admitting the evidence of litigation tactics challenged on appeal, the court decided the facts and circumstances under which those particular communications were made were not undisputed (Nguyen v. Proton Technology Corp., supra, 69 Cal.App.4th at p. 147), and there were factual issues for the jury to determine. Based on the foregoing, we find no error in the court's evidentiary rulings.

D. Jury Instructions:

The Landlords challenge for the first time on appeal two sets of instructions read to the jury. One set of instructions generally described what occurred in the first phase of trial. It reiterated the court's ruling that the Landlords had the power but not the right to dispute the division of the subsidy. The second set of challenged instructions consisted of the special instruction which grew out of the hearing on the Landlords' motions in limine. Instructions alleged to contain an incorrect statement of the law are deemed excepted under Code of Civil Procedure section 647. (U.S. Roofing, Inc., supra, 228 Cal.App.3d at p. 1447.) We therefore turn to the merits of the Landlords' claim.

We already concluded the court's instruction on the first phase of trial -- that "the Fosters and Fjellines had the power to challenge the allocation of the subsidy payment, but they did not have the right to do so" -- is a correct

statement of the law.[7] The Landlords now complain that "[b]ased on this instruction, the jury could only find that no privilege protected [their] conduct and communications." They also contend the court compounded the first instructional error "when it allowed the jury to commence deliberations without instructing on the litigation privilege," and gave an instruction that "materially misstated the law, was internally inconsistent, and hopelessly muddled."

The court instructed the jury at the beginning of trial on the Tenants' claim for intentional inflictions of emotional distress that the jury phase of the trial was completely separate from the earlier court trial. It told the jury it was bound by the court's decision on the contract claims, and continued: "What this jury will decide then is whether the conduct of the Fjellines and the Fosters amounts to the intentional infliction of emotional distress." The court repeated its admonitions during and at the close of the jury trial. Thereafter, it instructed the jury on the litigation privilege. We assume the jury followed the court's instructions (Jensen v. BMW of North America, Inc. (1995) 35 Cal.App.4th 112, 128), and therefore reject the assertion the court's instructions precluded the jury from finding that the litigation privilege applied.

The court sent the jury to deliberate at 1:58 p.m. The court called counsel and the jury back to the courtroom at 2:50 p.m. when it realized it had not instructed the jury on the litigation privilege. The jury resumed its deliberations at 2:53 p.m., after the court read the challenged instruction. The Landlords fail to explain on appeal how this slight delay in giving a portion of the instructions prejudicially affected the verdict. (Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 580.) We conclude it did not.

With respect to the challenged portions of the instruction on litigation privilege, we conclude they are

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[7] See discussion, *ante*, at pages 12 to 15.

correct statements of the law.[8] (See Kimmel, supra, 51 Cal.3d at p. 211 [privilege inapplicable to conduct as opposed to statements and publications]; Silberg, supra, 50 Cal.3d at pp. 218-220 [connection with litigation and parties covered by privilege]; Edwards v. Centex Real Estate Corp. (1997) 53 Cal.App.4th 15, 35 [threat of litigation]; Rothman v. Jackson (1996) 49 Cal.App.4th 1134, 1141, 1146 [connection with litigation and parties covered by privilege]; and Evid. Code, § 500 [burden of proof of defense].) In light of this conclusion, we need not address the concerns set forth in Sandoval v. Bank of America (2002) 94 Cal.App.4th 1378, and raised by the Landlords in oral argument.

V

Punitive Damages

The jury awarded the Grecos $25,000 in punitive damages against each of the four cross-defendants for a total of $100,000. We reject the Landlords' contention that the jury award was excessive as a matter of law.

First, the Landlords argue an erroneous jury instruction on agency allowed the jury to assess punitive damages against the non-lawyer cross-defendants.[9] "While

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[8] The Landlords question the following portions of the instruction on litigation privilege:

"It's not enough that the statement bear a connection or logical relation to the litigation. The connection must function as a necessary or useful step in the litigation process."

"The mere possibility that a lawsuit might be filed is insufficient for application of the privilege."

"The threat of a lawsuit is not privileged if the threat is just a negotiating tactic and not a serious proposal made in good faith in contemplation of going to court. The contemplated litigation must be imminent."

"Statements made [to] inform non-participants in the action are generally not privileged."

"The privilege does not apply to a person's conduct or actions."

"The persons asserting the privilege have the burden of proving the applicability of the privilege to their statements by a preponderance of the evidence."

[9] The Landlords take issue with the last sentence of the agency instruction which read: "The court instructs you that Linda Smart-Foster,

much of what an attorney does in litigation is contractually binding on the client [citations], where it is tortious the client is not vicariously liable merely for retaining the attorney who is an independent contractor. [Citations.] The client is insulated from tort liability for the attorney's litigation conduct on his behalf where '[t]here is no showing . . . of ratification or any other act by [the client] endorsing or approving the attorney's actions.' [Citation.]" (Palmer v. Ted Stevens Honda, Inc. (1987) 193 Cal.App.3d 530, 539.) In this case, there is evidence of ratification by Bill Foster and Dave Fjelline. Although there was no trial testimony by Teresa Fjelline, the jury could reasonably infer that she ratified Linda Foster's litigation conduct as a co-owner of the property. We accept as true all evidence and reasonable inferences tending to establish the correctness of the trial court in finding and instructing the jury that each of the Landlords was an agent for the other. (Bancroft-Whitney Co. v. McHugh, supra, 166 Cal. at p. 142.) We will not substitute our deductions for those of the jury in imposing punitive damages on Teresa Fjelline, in light of the conflicting inferences that can be reasonably deduced from the facts. (Crawford v. Southern Pacific Co. (1935) 3 Cal.2d 427, 429.)

Next, the Landlords assert that counsel's argument improperly inflamed the jury's passions and prejudices. Their failure to make a timely and proper objection to the Tenants' closing argument waives this issue on appeal. (Sabella v. Southern Pac. Co. (1969) 70 Cal.2d 311, 320-321.)

The Landlords also contend we must vacate the punitive damage award because the record lacks sufficient evidence of each cross-defendant's net worth. It is true we "cannot make a fully informed determination of whether an award of punitive damages is excessive unless the record contains evidence of the defendant's financial condition." (Adams v. Murakami (1991) 54 Cal.3d 105, 110.) The record

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Guy Foster, Dave Fjelline and Teresa Fjelline were at all times agents of each other in undertaking the acts which have been testified to."

in this case does, in fact, describe the Landlords' financial condition. The jury was aware the Landlords had $250,000 of equity in the farm, and that each held a one-quarter interest in that property. The Landlords do not argue the award was disproportionate to the award of compensatory damages. (See Douglas v. Ostermeier (1991) 1 Cal.App.4th 729, 750.) We conclude the record supports the jury verdict.

A jury may apportion punitive damages among joint tortfeasors in various amounts according to their individual culpability. (Roberts v. Ford Aerospace & Communications Corp. (1990) 224 Cal.App.3d 793, 801-802.) The Landlords argue the court erred in granting judgment for joint and several punitive damages in the amount of $100,000 where the jury verdict separately assessed $25,000 against Linda Foster, Bill Foster, Dave Fjelline and Teresa Fjelline. After polling the jury on its award of $25,000 against each of the four Landlords, the trial court asked, "In awarding these damages, are these damages to be assessed so that the total is $100,000.00?" The foreperson responded, "That is correct." In our view, the jury's response merely affirmed the sum of the punitive damage award, and did not demonstrate an intent to make the punitive damage award joint and several. We therefore modify the judgment to properly reflect the jury's separate, but not joint, assessment of punitive damages against each of the four Landlords.

DISPOSITION

The judgment is modified to correct the amount of contract damages to $32,647.50, and make the award of punitive damages several, not joint and several. The judgment is affirmed as modified. Defendants, cross-complainants, and respondents John Nick Greco and Lorraine Greco shall recover their costs on appeal.

CALLAHAN, J.

We concur:

DAVIS, Acting P.J.

RAYE, J.

APPENDIX B
United States Department of Agriculture *"in dispute"*
Determination
Rule (i)(ii)

UNITED STATES OFFICE DEPARTMENT OF AGRICULTURE
FARM SERIVCE AGENCY
PLACER-NEVADA-ELDORADO FSA
251 Auburn Ravine Rd., Suite 203
Auburn, CA 95603-3719

March 20, 1998

Guy Foster[1]
5275 Wise Road
Lincoln, CA 95648

Dear Mr. Foster:

This letter is a follow-up to your conversation with this office on March 18. In that conversation we were advised that you and Mr. Fjelline are disputing the shares shown on your Production Flexibility Contract (PFC).

According to information provided by our state office you may dispute the shares in your contract as the lease does not stipulate how the PFC payments will be distributed. Because the shares are now in dispute, please be advised, no further payments will be issued until the dispute is settled. The County Committed may not settle division of payments disputes; however, they may assist by providing suggestions. Let me reiterate, if the dispute is not settled, further payments will not be issued.

Please contact this office if you wish additional information.

Sincerely,

/s/ Wilma C. Powers
Wilma C. Powers
County Executive Director

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[1] Evidence shows this same letter was written to David Fjelline and to John Greco.

Appendix C
Order That Respondent Disclose Names His Other Landowners
Rule (i)(ii)

FILED
Superior Court of California
County of Placer
NOV 17 1998
Carl DePietro

LINDA SMART-FOSTER (State Bar No. 133315)
Attorney At Law
P. O. Box 994
Lincoln, CA 95648
Telephone (916) 645-2205

Attorney for Plaintiffs, David P. Fjelline, Teresa Reed Fjelline, Guy William Foster, and Linda Foster

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF PLACER

David P. Fjelline, Teresa Reed Fjelline, Guy William Foster, and Linda Foster, Plaintiffs, vs. John N. Greco, Lorraine Greco, and DOES I through X, Defendants.	No. SCV 6972 ORDER ON PLAINTIFFS' MOTION TO COMPEL FURTHER RESPONSES TO REQUEST FOR PRODUCTION OF DOCUMENTS, SPECIAL INTERROGATORIES, FORM INTERROGATORIES AND REQUEST FOR ADMISSIONS Date: 11/3/98 Time: 8:30 a.m. Dept.: 4

The Court having issued its tentative ruling on Plaintiff's Motion To Compel Further Responses To Request For Production Of Documents, Special Interrogatories, Form

Interrogatories And Request For Admissions, set for November 3, 1998, and no oral arguments having been requested,

IT IS ORDERED that the motion is granted as to Request for Production of Documents 3, 11, 12, and 20. The objections to the Request for Production of Documents was untimely.

IT IS FURTHER ORDERED that defendant further respond to Form Interrogatories 10.3, 15.1(b) and 15.1(c) and that defendant respond to request for clarification on Request for Admission 11.

DATED: November 17, 1998

/s/ James L. Roeder
James L. Roeder
Judge of the Superior Court

APPROVED AS TO FORM:

/s/ Paul Minasian
Paul Minasian

Appendix D
Unlawful Detainer Judgment
Rule (i)(ii)

FILED
Superior & Municipal Courts
Of Placer County
MAY 18 1998
Carl DePietro, Clerk
/s/ S. Woodman

MUNICIPAL COURT, PLACER COUNTY JUDICIAL DISTRICT
THE COUNTY OF PLACER, STATE OF CALIFORNIA

David P. Fjelline, et al. Plaintiffs, v. John N. Greco, Lorraine Greco, Defendants.	No. MCV 4146 PROPOSED JUDGMENT

The above entitled case came on regularly for trial in Department Four of the above-entitled Court on May 14, 1998, Robert P. McElhany, presiding. Present were: Attorney Linda Smart-Foster, for and with plaintiffs, and Attorney Paul R. Minasian, for and with defendants. Evidence, both oral and documentary, was presented and the matter was submitted for decision.

The Court finds that defendant, John N. Greco, entered into an agricultural lease for the property the subject of this law suit with the plaintiffs' predecessor in interest, Louise W. Surmon. That the rights and obligations of the parties created by that lease are the subject of a declaratory relief action, Case No. SCV 6972, now pending between the parties. In order to determine whether or not defendants

have breached the lease, and are therefore unlawfully detaining the property, there must be a resolution of those disputed rights and obligations. Absent such a resolution there can be no finding that the defendants have, in fact, breached the lease, and that plaintiffs are entitled to possession of the property.

Accordingly, plaintiffs shall take nothing by their complaint.

Attorney for defendants to prepare an appropriate judgment.

DATED: May 18, 1998

/s/Robert P. McElhany
Robert P. McElhany

APPENDIX E
Ruling on Petition for Review
Rule (i)(iv)

SUPREME COURT
F I L E D
JUL 24 2002
Frederick K. Ohlrich
Clerk
Deputy

Court Of Appeal, Third Appellate District - No. C035835
S107351

IN THE SUPREME COURT OF CALIFORNIA

DAVID P. FJELLINE et al., *Plaintiffs, Cross-defendants, and Appellants,*

v.

JOHN N. GRECO et al., *Defendants, Cross-complainants, and Respondents.*

Petitions for review DENIED.

The requests for an order directing publication of the opinion are denied.

Werdegar, J., and Brown J., were absent and did not participate

GEORGE
Chief Justice

APPENDIX F
Petitions for Rehearing
Rule (i)(vi)
California Rule of Court, Rule 29(b)(2) – Preserves Facts
Arguments Not Reported in Slip Opinion

FILED
Court of Appeal Third District
California Court of Appeal
Third Appellate District
MAY 23 2002

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

DAVID P. FJELLINE, et al., Plaintiffs, Cross-defendants and Appellants v. JOHN N. GRECO, et al., Defendants, Cross-complainants and Respondents.	3 Civil C035835 Placer County Superior Court No. SCV 6972

APPELLANTS DAVID P. FJELLINE, TERESA REED FJELLINE, AND GUY WILLIAM FOSTER'S PETITION FOR REHEARING

Appeal from Judgment of the Superior Court of California
County of Placer
The Honorable James D. Garbolino, Judge

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Attorneys for Plaintiffs, Cross-defendants and Appellants, David P. Fjelline, Teresa Reed Fjelline, and Guy William Foster

INTRODUCTION

By this petition for rehearing Bill Foster, David Fjelline and Theresa Fjelline seek to bring to the court's attention mistakes of law and errors of fact that have resulted in an erroneous decision and a miscarriage justice. Linda Foster, whose conduct as an attorney representing the three lay petitioners has, according to the court's decision, subjected them not only to tort damages, but to punitive damages, has elected to represent herself in a separate petition for rehearing. The ruling on punitive damages turned on an issue, ratification, not briefed by any party and as to which appellants are entitled to rehearing. Gov't Code § 68081.

The court's diligence in reviewing the record is evident from the opinion, yet petitioners are confident that the errors disclosed by this petition will merit the court's reconsideration of the result, which the court has accurately characterized: a dispute over division of $16,480 in federal rice subsidy payments ended in a judgment awarding tort damages, including punitive damages exceeding the appellants' entire financial resources. The holding constitutes an substantial and important departure from current law by allowing recovery for emotional distress suffered as a result of litigation conduct outside the context of a malicious prosecution or abuse of process action. By upholding punitive damages against clients for their attorney's tortious conduct, the opinion is contrary to precedent.

Also, the court's determination that following federal Farm Services Agency procedures to resolve a valid dispute breaches the underlying crop share lease decides an important question of first impression. Neither the parties nor the court found a decision anywhere in the country that so holds. The Louisiana decision upon which the opinion relies supports the contrary conclusion. Farmers and tenants in Placer County and throughout California need to know that in this state availing themselves of the federal

administrative procedures may subject them to damages equal to the value of their farms.

Alternatively and in addition, petitioners will request that the court publish its opinion, which constitutes a departure from existing law and determines important questions of first impression. Cal. Rules of Court, rule 976(b)(1).

ARGUMENT

I. A PETITION FOR REHEARING APPROPRIATELY RAISES ERRORS OF LAW AND MISTAKES AS TO THE FACTS AS WELL AS DISPOSITIVE ISSUES NOT PROPOSED OR BRIEFED BY ANY PARTY

Petitions for rehearing are permitted by the rules of court, for the purpose of correcting any error is that the opinion, or of enabling counsel to direct the attention of the court to matters presented at the argument, which may have been overlooked in the decision. Cal. Rules of Court, rule 27; see *San Francisco v. Pacific Bank*, 89 Cal. 23, 25 (1891).

In addition, before a court of appeal renders a decision based upon an issue that was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court does not afford that opportunity, a rehearing shall be ordered upon timely petition of any party. Gov't Code § 68081. The opinion's affirmance of punitive damages against each individual defendant turns on ratification, an issue not proposed or briefed by any party.

Due process considerations are implicated to the extent that tort damages are based on evidence that appellants filed motions, appeals and other legal proceedings during the course of litigation, or opposed motions filed by the other party. *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001); *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1131 (1990).

Pursuing authorized forms of relief before courts or other governmental tribunals is a protected right and cannot be the basis for tort liability, except in a properly pleaded action for malicious prosecution. There is no tort of " 'malicious defense' " arising from conduct in defending a lawsuit and trial tactics and litigation conduct may not be used to impose punitive damages in a tort action. *De Anza Santa Cruz Mobile Estates,* 94 Cal. App. 4th at 918; *Palmer v. Ted Stevens Honda, Inc.,* 193 Cal. App. 3d 530 (1987).

The award of punitive damages cannot be affirmed based on the unbriefed issue of ratification because the jury was erroneously instructed that her clients, as members of a joint enterprise with the right to control their lawyer, were in effect *deemed* to have authorized Linda Foster's conduct. That the jury must have so understood the instructions is shown by its award of punitive damages against Teresa Fjelline, as to whom there was *no* testimony or other evidence. (opinion p. 36).

More fundamentally, the opinion identifies no conduct to support an award of tort damages except pursuit of administrative remedies and litigation. Until now damages for abuse of process or malicious prosecution could not be recovered under the rubric of a cross-complaint for intentional infliction of emotional distress. This is new law and the opinion should either be reconsidered or published.

The principles involved are important not only to the farming community but to citizens who seek to resolve disputes concerning interpretation of contracts through the courts and, in this case, through federal administrative proceedings. Appellants need to know what conduct – of their own or of their attorney – exposed them to this devastating loss. A decision reaching this conclusion, if not reconsidered, should be published under the standards set forth in California Rules of Court, rule 976 (b)(1).

II. The Conclusion Of Breach And Unprivileged Conduct Misconceives The Operative Federal Crop Subsidy Law

The opinion "question[s] the extent to which federal regulations regarding eligibility for crop proceeds 'controlled' the court's interpretation of the lease provisions." (opinion p. 16). Allow us, by answering that question, to demonstrate the opinion's errors of law and fact.

Respectfully, appellants conclude that the opinion affirming the trial court's finding that appellants had the "power but not the right" to pursue their federal rights (opinion p. 15) reflects error based on incomplete consideration of the federal law set forth in the Appellants' Opening and Reply Briefs. Labeling this conduct as unprivileged (appellants had the "power but not the right") determined the outcome of both the contract and intentional infliction of emotional distress claims.

The opinion's error results in a legal Catch-22 and deprivation of constitutional and statutory rights : (1) when a landlord purchases property eligible for rice subsidy payments and enters into a crop share lease with a farmer tenant, federal law requires the landlord and tenant to agree on the terms of a *new* PFC contract or neither may receive crop subsidy payments, (2) their agreement will not be effective until the FSA determines that the new agreement is fair and equitable to both landlord *and* tenant, but (3) the landlord with a dispute deemed valid by the FSA concerning the PFC breaches his tenant's crop share lease, if he follows the federal administrative procedure to resolve the PFC dispute.

The opinion appropriately emphasizes that the subject of this appeal involves interpretation of the "Tenants' lease with the Landlords, *not* the PFC [Production Flexibility Contract] executed by the parties and the Commodity Credit Corporation" (opinion p. 13). However, because these two agreements were independent and the PFC was within the exclusive jurisdiction of the FSA, the opinion errs in holding

that the landlords breached the crop share lease, when they sought the FSA's assistance to resolve a dispute concerning the separate PFC . As the opinion recognized, this was determined by the FSA to be a valid dispute. (opinion p. 7) (RT 217-219; Exs. 7, 14). Under the federal law *only* the FSA may determine whether the crop subsidy split in the PFC is fair both to tenant and to landlord (7 CFR § 1412.303(a); *see also* 7 U.S.C. § 7214(g)). Under federal law, if the dispute is determined to be valid, the FSA withholds the crop subsidy until the dispute is resolved. (Ex. 13 USDA Handbook pp. 5-20, 5-25, 5-26, 5-28).

As a matter of federal farm subsidy law, appellants had not only the power, but the absolutely protected right to put their crop subsidy shares in dispute as a condition precedent to resolution of a dispute determined by the FSA to be valid. The opinion's contrary construction of the lease deprives appellants of their rights under the federal law governing crop subsidies, just as the landlord's conduct in *Romero* deprived the tenant of its rights under the federal law.

A. The Opinion Reflects Incomplete And Erroneous Consideration Of Federal Law Governing Crop Subsidy Payments

The opinion does not take into consideration critical provisions of the federal law as modified by the 1996 Farm Bill and as set forth in the Appellants' Opening and Reply Briefs. Under current federal law both landlords and tenants are "producers" and the law protects both the producer who contributes land and the producer who contributes labor. All producers, landlords and tenants, have the basic right to have the FSA review their PFC contracts and determine whether the proposed split of crop subsidies set forth in their PFC is fair both to landlord and to tenant. (AOB pp. 25-26).

The opinion does not reflect the court's understanding that, as a matter of federal law, the old PFC

contract between Mrs. Surmon and Wilmot Brown terminated automatically when the property changed hands from Mrs. Surmon to the Fosters and Fjellines and from Brown to Greco. 7 U.S.C. § 7217(a); 7 CFR § 1412.201(a). (AOB p. 25). The opinion does not reflect understanding that to initiate a new PFC, all eligible producers[1] must *agree* on how to share crop subsidies. 7 CFR § 1412.201(c). It is true, as the opinion recognizes, the landowner would be eligible for the full crop subsidy even if the land were not farmed (and Greco did not tell the new owners of this new rule). (opinion p.4). However, once the land is leased on a crop share basis, the critical regulation not considered by the court's opinion is that neither the landlord nor the tenant may receive 100 percent of the subsidy payment. 7 CFR § 1412.303(b). Also, unless all producers sign a PFC designating payment shares, no producer will be eligible for a payment for that farm for that fiscal year. 7 CFR § 1412.302(b). (AOB pp. 25-26).

Contrary to the implicit holding of this opinion, *no* agreement to share crop subsidies is valid *unless and until* the FSA County Committee determines that the split is fair and equitable to both parties:

> Each eligible producer on a farm shall be given the opportunity to enroll in a contract and receive contract payments *determined fair and equitable as agreed to by the producers on the farm and approved by the county committee.*
>
> 7 CFR § 1412.303 (emphasis added)

It follows that, contrary to this court's opinion, when Greco entered into the crop share lease, he had no right – enforceable through the crop share lease or through the

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[1] 7 CFR § 1412.202 defines eligible producers to include an owner who assumes part of the risk of producing a crop and a producer (other than an owner) with a share rent lease. Thus, the Fosters and Fjellines and the Grecos were the "eligible producers," if they agreed to the same Production Flexibility Contract.

parties' yet-to-be-executed PFC – to receive any crop subsidy unless and until the parties agreed to the terms of a new PFC *and* the FSA county committee determined that the proposed crop subsidy split was fair and equitable to both appellants and the Grecos.

When the FSA County Committee determined that the landlord and tenant had a valid dispute concerning the terms of a new PFC, federal regulations, not the landlord's or the tenant's conduct, determined that the FSA would withhold subsidy payments until an agreement was reached. (Ex. 13 USDA Handbook pp. 5-20, 5-25, 5-26, 5-28) (AOB p. 15).

As the opinion recognizes and states, the FSA found that the landlords had a valid dispute under federal law concerning the tenant's claim not only to 90% of the proceeds from crops grown but also to 90% of the crop subsidy payments on both farmed and unfarmed land. (opinion pp. 7-8). The FSA found that Grecos' proposed split was not equitable.

Based on this federal law appellants correctly asserted that a lease that bars a landowner from exercising his rights under federal farm law is void as against public policy. Civ. Code § 1668. (AOB pp. 27-28). If the lease provision barred the landowner from access to FSA administrative dispute resolution procedures, it was invalid. *See e.g. Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 100 (2000) (invalid contract provision deprived employees of FEHA rights) (AOB p. 28); *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465, 480 (1976) (invalid provision of hospital's bylaws deprived hospital staff of rights to personal redress) (opinion p. 25).

This court should reconsider the issue of breach in light of the law cited here and in the prior briefing to this court.

B. *Romero v. Herpin* Does Not Support the Opinion's Holding on this Important Question of First Impression

The opinion errs in relying on *Romero v. Herpin*, 579 So.2d 1218 (La. App. 1991), a Louisiana decision (not cited or briefed by the parties). (opinion p. 14). Neither the parties nor the court of appeal found any decision that construed a crop share lease to preclude landlord access to FSA program benefits.

The opinion cites *Romero* to support the critical holding in this case that "[the Landlords'] election to take that step [to place their shares in dispute] constituted a breach of the lease." (opinion at p. 14). This holding is critical because the landlords' election to dispute the crop share is not only the conduct found to constitute breach of the lease, but also the only conduct identified by the opinion as unprivileged (and therefore capable of supporting an award of damages for intentional infliction of emotional distress and punitive damages).

Romero's reasoning would require a finding in this case that the *tenant* (Greco) breached the lease when he refused to allow the *landlords* (appellants) to take advantage of their rights under the crop subsidy program. In *Romero* the landlord's refusal to cooperate so that its tenant could take advantage of the federal farm subsidy program was a breach of their lease. Here, in contrast, the court erroneously construed the payment term of the crop share lease to prevent the *landlords* from taking advantage of *their* rights under the federal subsidy program, as discussed in more detail above.

Under *Romero*'s reasoning, the landlord producer must be allowed to resolve a dispute deemed valid by the FSA according to the rules of the federal farm subsidy program. Under the rules of the federal farm subsidy program, the FSA has exclusive jurisdiction to determine whether a dispute is valid and whether a proposed subsidy

split is fair and equitable to both landlord and tenant. 7 CFR § 1412.303(a); *see also* 7 U.S.C. § 7214(g).

Review of this law and the facts supports a rehearing or revision of the court's decision to protect appellants' statutory and constitutional rights of access to judicial and administrative dispute resolution mechanisms. *See e.g., Westlake Community Hosp. v. Superior Court,* 17 Cal. 3d at 480 (provision of a hospital's bylaws whereby hospital staff waived any rights of personal redress against public policy) (opinion p. 25).

Finally, the opinion fails to recognize that, unlike the tenant in *Romero,* the Grecos did in fact receive the (optional) subsidy prepayment prior to planting season pursuant to 7 CFR § 1412.302(a). Greco acknowledged that he had received $7,000 from the FSA, which was to have been for planting the appellants' property. (RT 97). He testified he decided not to use his line of credit or the federal payment because he was being sued and the new owners had put the payments shares in dispute. (RT 102-03, 672, AT 61-2). The Grecos, not the appellants, decided that it was economically efficient to breach the lease by not planting rice. (See opinion at pp. 14-15). The Grecos received the additional payment comprising the *full* rice subsidy subsequent to trial without having planted any rice. (CR 1911-13).

Based on these facts, Greco's situation was entirely unlike Romero's and the court should reconsider its reliance on this decision.

C. Binding Appellants to Claimed Custom and Usage Reflects Errors of Fact and Law

Contrary to the opinion at page 18, appellants *did* challenge the trial court's finding that they were "negligent and failed to perform any reasonable investigation" of the claimed custom and usage. Their challenge to this finding was based on the trial court's legal errors (1) in binding them to custom and usage of which they were unaware, citing *Peiser v. Mettler,* 50 Cal. 2d 594 (1958) and (2) in applying

custom and usage to change or affect application of binding federal law. (AOB pp. 29-33). Under *Peiser* ordinary negligence is not the standard; instead, the issue is a legal one to be determined *de novo* by this court. (AOB pp. 22-23).

The opinion's discussion of custom and usage reflects mistakes of both law and fact. This section of the opinion does not cite or distinguish *Peiser v. Mettler*, 50 Cal. 2d at 608-609 (AOB pp. 30-32, 35), concerning interpretation of a farm lease through custom and usage:

> "'To bind one who is not engaged in the trade or occupation which employs the usage relied upon, proof of his actual knowledge of the usage is necessary, unless it is so commonly accepted that the public is presumed to recognize its existence...
>
> "So in the case at bar it does not appear that either party manifested an intention to be governed by the asserted custom. ... There was no evidence that defendant was a farmer. [Citation.] So far as the record shows, defendant was a stranger to farming customs." In the case at bar there is nothing to show that plaintiffs, or any of them, were farmers or that they knew anything of farming customs.

The jury's question demonstrated that the claimed custom was not so universal that the public could be presumed to know of its existence. The Placer County jury specifically asked "[whether] Greco [was] out of the ordinary in his lease? Do other farmers have the same approximate practices and split of crop - owners have all the federal money if they don't plant?" (RT 793).

Under *Peiser*, the trial court erred in binding the Fosters and Fjellines to custom and usage of which it found they were unaware and which was not so commonly accepted that the general public could be presumed to recognize its existence. Under *Peiser*, the claimed usage was

not a custom of which appellants knew or should have known, as a matter of law.

In addition, the opinion's focus on Mrs. Surmon's understanding of the lease payment term (which term, the opinion acknowledges, is silent as to and *separate from* the terms of the PFC) (opinion p. 18), reflects legal error affecting the opinion. As a matter of federal law, Mrs. Surmon's intent or understanding about the lease payment term (accepting this court's determination that she had such an understanding) could not bind the FSA or appellants to Greco's proposed split of the crop subsidy in the new, yet-to-be-executed PFC.

To summarize the federal law discussed above (1) Greco and the appellants were obligated by law to enter into a *new* PFC contract because the farm property had changed hands, (2) neither Greco nor Surmon could dictate the terms of the PFC because the FSA farm committee had to find that the proposed split of crop subsidies in the PFC was fair to *both* parties before either party could receive any subsidy, (3) after the 1996 Farm Bill, the crop share in the lease was independent of the crop subsidy split in the PFC, and (4) the FSA found that appellants had a valid dispute about Greco's proposed split of the crop subsidies (and eventually agreed with appellants that Greco's proposed split of subsidies attributable to unfarmed acres was *not* fair and equitable to appellants).

The opinion does not distinguish the authorities cited by appellants for the proposition that custom and usage based on superseded law could not bind the appellants or (the FSA). *Hayward Tamkin & Co. v. Carpenteria Inv. Co.*, 265 Cal. App. 2d 617, 624 (1968) (usage cannot change a rule of law); *American Nat. Bank v. Sommerville*, 191 Cal. 364, 370 (1923) (instrument cannot be made negotiable by business custom, where it fails to conform to the provisions of the statute). (AOB p. 32).

Based on these errors of fact and law, rehearing should be granted and the court should reconsider its determinations (1) that appellants had the right but not the

power to pursue their exclusive federal administrative remedy to resolve a valid dispute concerning division of the crop subsidies, which, as the opinion finds, were independent of the lease and (2) pursuit of that federal remedy breached the lease.

Alternatively, the court should publish its decision on this important question of first impression so that the thousands of producers who crop share will know that following the FSA's instructions and program regulations may result in loss of their property.

III. THE FINDING OF UNPRIVILEGED CONDUCT IS CONTRARY TO EXISTING LAW CIRCUMSCRIBING TORT RECOVERY FOR PURSUIT OF LITIGATION

The opinion does not identify *any* conduct that was not absolutely protected by Civil Code section 47(b) or the appellants' First Amendment and due process rights to pursue administrative and judicial dispute resolution remedies. *See generally, Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1133 (1990) (Reply Brief p. 18); *Brown v. Kennard*, 94 Cal. App. 4th 40, 45 (2001) (47(b) bars abuse of process, fraud, intentional inducement of breach of contract, *intentional infliction of emotional distress*, intentional interference with prospective economic advantage, invasion of privacy, negligence, and negligent misrepresentation; malicious prosecution is the only tort not subject to the litigation privilege).

The opinion is inconsistent with this court's recent decisions in *Brown v. Kennard*, 94 Cal. App. 4th 40 (2001) (policy underlying the litigation privilege of encouraging free access to the courts by discouraging derivative litigation simply outweighs the policy of providing tort remedy for an allegedly wrongful enforcement of a judgment; absolute privilege applies without regard to malice or evil motives) and *Home Ins. Co. v. Zurich Ins. Co.*, 96 Cal. App. 4th 17 (2002)

(reviewing policy underlying privilege; misstating terms of insurance policy absolutely privileged).

The operative pleading, the cross-complaint, contains no allegation of unprivileged conduct. (CR 80). The cross-complaint alleges that appellants made a "disingenuous claim," pursued disputes "without legitimate basis" and acted "in bad faith." The only tort remedy for the conduct alleged in the cross-complaint is malicious prosecution (which would be barred by the FSA's finding of a valid dispute). *See Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 875 (1989).

The opinion states "At issue at this trial was the sometimes difficult distinction between statements and publications, which are covered by the [litigation] privilege, and conduct, which is not." (opinion p. 24). Yet the opinion identifies *no* conduct (alleged in the cross-complaint or in evidence at trial) that was not absolutely privileged as a matter of law. All of the conduct set forth in the opinion constituted pursuit of administrative and judicial dispute resolution remedies or defense against the cross-complaint. Appellants deserve to know – what conduct did they engage in that resulted in this crushing loss?

A. Pursuit of Administrative Remedies to Resolve a Valid Dispute is Privileged

The opinion discusses at length its conclusion that appellants had the "power but not the right" to pursue its federal administrative remedy to resolve a valid dispute. We conclude that the court found this to be wrongful, unprivileged conduct. Yet pursuit of administrative remedies is absolutely protected conduct as is taking the steps necessary to preserve a dispute for administrative or judicial resolution.

The FSA's procedure was "official" within the meaning of Civil Code section 47(b). The FSA had *exclusive* jurisdiction to determine whether Greco's proposed PFC allocation was "fair and equitable." 7 CFR § 1412.303(a); *see*

also 7 U.S.C. § 7214(g). An example of the privilege's application to nonjudicial proceedings before entities without enforcement power is *Braun v. Bureau of State Audits*, 67 Cal. App. 4th 1382, 1390 (1998) (AOB p. 41, Reply Brief p. 25).

Signing a PFC contract with undesignated shares was a "necessary first step" or regulatory "prerequisite to the pursuit of" the FSA dispute resolution process (RT 215, 216-17, Exs. 13 & 14) (AOB pp. 14-15) and therefore also privileged (*see e.g., Wilton v. Mountain Wood Homeowners Assn.*, 18 Cal. App. 4th 565, 569 (1993) (homeowners assessment lien privileged) (Reply Brief p. 25). The opinion errs in concluding that pursuit of administrative remedies is unprivileged conduct supporting damages for the alleged intentional infliction of emotional distress.

The jury should have been but was not instructed that the appellants' pursuit of rights under the crop subsidy program was absolutely privileged. Instead, the jury was instructed to consider this privileged conduct as evidence of intent to inflict emotional distress. The opinion is mistaken in stating that the trial court instructed the jury that the intentional infliction phase of the trial was completely separate from the earlier court trial. (opinion p. 34). To the contrary, the court admitted evidence of the subsidy dispute as evidence of intent to inflict emotional distress. The cross-complaint alleged this dispute was the basis of the cause of action for intentional infliction. (CR 80). Respondents' counsel argued this was despicable, wrongful conduct. (RT 1046-47, 1048-49, 1051). The record reflects that this allegedly tortious conduct was a major part of the evidence the jury was asked to find unprivileged. Since the court told the jury it was wrongful, the court directed a finding against appellants. (AOB p. 49).

B. The Opinion Identifies only Privileged Conduct as the Basis for Tort Damages

If not pursuit of their federal administrative remedy, what was the unprivileged conduct? Appellants have reviewed the opinion and find no identification or discussion of *any* unprivileged conduct. Was it going to the FSA office to learn about crop subsidies or signing the PFC presented to them by the FSA? (opinion p. 4). Surely not. Was it trying to discuss resolving the disagreement with Greco prior to instituting declaratory relief? (opinion p. 4). Of course it could not be. Was it signing the new PFC under protest to protect Greco's receipt of money for spring planting? (opinion p. 5). No. Was it suggesting a settlement and paying the Greco's utility bills? (opinion p. 5). How could it be? Was it writing a letter in anticipation of instituting a declaratory relief action? (opinion pp. 5-6). The opinion recognizes that such statements are privileged.

Next the opinion points to signing the PFC putting the shares in dispute at the suggestion of the FSA, which is discussed above at length. (opinion p. 6).

Was it sending a letter with a final settlement offer and filing an action for declaratory relief? (opinion p. 7). The opinion recognizes that such statements are privileged. Instituting litigation is also protected, unless the litigation is maliciously prosecuted. *See Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 875 (1989). Was it receiving the FSA's letter and following the FSA's instructions for instituting administrative proceedings? (opinion p. 7). Apparently so, as discussed above.

Was it receiving Greco's counsel's threatening letter and responding to Greco's cross-complaint asserting privilege? (opinion p. 8). There is no tort of malicious defense of litigation. *See De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001).

Was it filing the unlawful detainer action or the first amended complaint? (opinion pp. 8-9). Pursuing authorized

forms of relief before courts or other governmental tribunals is a protected right and cannot be the basis for tort liability, except in a properly pleaded action for malicious prosecution. *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118 (1990). Was it writing to the tenants' counsel (not to the tenants, as the opinion states) on September 5, 1998? (opinion p. 9, Ex. S). The opinion recognizes that statements are absolutely privileged. Further, tort liability for litigation tactics has been limited to the context of bad faith actions against insurance companies based on the special relationship between insured and insurer. *See Palmer v. Ted Stevens Honda, Inc.*, 193 Cal. App. 3d 530, 539 (1987).

Was it moving *successfully* for summary adjudication of the defamation claim? (opinion p. 9). Surely not. Was it mailing a questionnaire to Greco's other landlords? (opinion p. 10). Again, the opinion recognizes that statements in litigation are absolutely privileged.

Yet the opinion describes this evidence as supporting the "Tenants' theory of liability . . . that the Landlords' actions demonstrated a course of conduct, apart from statements made in the litigation, intended to cause the Grecos emotional distress and drive them off the land." (opinion p. 32). Yet the *only* conduct or course of conduct identified by the opinion as wrongful is the absolutely privileged conduct of instituting administrative proceedings to resolve a dispute within the jurisdiction of the FSA. *All* of the other conduct recited in the opinion is conduct in pursuit of judicial remedies or in defense of the cross-complaint. If this litigation was conducted for an ulterior or improper purpose, the conduct is nevertheless absolutely privileged under existing law – the only possible exception being malicious prosecution, which was not at issue. *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1169 (1986).

The court has identified no evidence and there is no evidence of any conduct similar to the unprivileged, independently wrongful conduct considered in the decisions cited by the opinion. (opinion pp. 24-25) *Kimmel v. Goland*, 51

Cal. 3d 202, 211 (1990) (taping telephone conversations in violation of Penal Code § 632); *Ribas v. Clark*, 38 Cal. 3d 355 (1985) (eavesdropping in violation of Penal Code § 632); *Westlake Community Hosp. v. Superior Court*, 17 Cal. 3d 465 (1976) (revocation of hospital staff privileges without opportunity to be heard).

The court should reconsider its opinion in light of these authorities and the lack of any conduct except absolutely privileged conduct to support the judgment.

C. Reliance on *Oren Royal Oaks Venture* Indicates Mistakes of Fact and Law

The opinion's reliance on *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1168 (1986) (opinion pp. 25-26), results in a mistake of law. The opinion cites *Oren* for the proposition that statements made in the course of judicial proceedings may be used as evidence of the requisite intent. The distinction between an evidentiary privilege and the section 47(b) privilege is discussed in the appellants' Reply Brief at pp. 20-21.

Oren was an action for abuse of process, not an action for intentional infliction of emotional distress. The "requisite intent" referred to the motive element of abuse of process. And while *Oren* recognized that 47(b) might not bar evidentiary use of statements made in judicial proceedings, it held that statements indicating an ulterior, improper purpose for instituting or maintaining litigation could not *as a matter of law* support a judgment for abuse of process. The court *affirmed* the judgment after grant of summary judgment to the defendant. (Reply Brief pp. 20-21).

Nothing in *Oren* states or suggests that evidence of intent to inflict emotional distress through the pursuit of litigation is actionable. To the contrary, *Oren* states that there can be *no* recovery for malicious institution of litigation *except* in a malicious prosecution action. 42 Cal. 3d at 1169.

It is on this basis that *Palmer v. Ted Stevens, supra,* upon which appellants relied, distinguishes *Oren*. The

discussion of *Oren* in *Palmer* shows that *Oren* does not support the judgment in this case:

> Plaintiff also contends *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*[citation omitted] authorizes consideration of an attorney's litigation tactics as proof of an underlying intent. [citation omitted] However, the attorney there was the defendant and the issue was whether he had the requisite intent for abuse of process. [citation omitted]. The opinion does not consider whether the attorney's intent may be imputed to the client. *Id.* at 540.

Supposed evidence of intent to inflict emotional distress through institution of litigation or administrative proceedings was *irrelevant* (and therefore inadmissible, Evid. Code § 350) because the allegedly tortious conduct was institution and maintenance of administrative and judicial proceedings. *See Palmer v. Ted Stevens Honda*, 193 Cal. App. 3d at 540 (improper and inflammatory to admit evidence of attorney's litigation tactics). The evidence was inadmissible *because* this was not an action for malicious prosecution. The highly prejudicial evidence could not support the tort of intentional infliction of emotional distress. *Oren* does not support the opinion's conclusion. Based on *Oren* the opinion represents a substantial departure from existing law.

D. The Opinion Represents a Substantial Departure from Existing Law by Allowing Recovery for Litigation Conduct in an Action not for Malicious Prosecution

The opinion's conclusion that the record contains *any* evidence, much less substantial evidence, of unprivileged conduct supporting an award of tort damages is a substantial and important departure from existing law.

Malicious prosecution is currently the *only* appropriate remedy for institution of litigation allegedly without cause. Abuse of process protects against misuse of

the court's power, but the filing or maintenance of a lawsuit – even for an improper purpose – is not a proper basis for an abuse of process action. *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1169 (1986). These are disfavored causes of action because our judicial system assiduously protects citizens' rights to seek redress through the courts. *See Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 875 (1989); *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 888-889 (1992); *see also Rubin v. Green*, 4 Cal. 4th 1187, 1199 (1993) (cautioning against expanding tort liability to include litigation-related misconduct).

Greco did not plead these theories and the jury was not instructed on their exacting standards.

Alternatively, the opinion establishes new law substantially expanding tort liability for instituting and defending against litigation and should be published.

IV. THE OPINION'S CONCLUSION OF INVITED ERROR RESTS ON ERRORS OF FACT AND OF LAW

The opinion's discussion of waiver does not accurately reflect the briefing or the facts. (opinion p. 22). Thus, to support its finding that appellants invited the trial court's error in giving an issue of law to the jury over appellants' objection, the opinion states that the "Landlords generally assert the court should have dismissed the cross-action for intentional infliction of emotional distress before the jury trial – presumably on the motion for judgment on the pleadings. . . . The litigation privilege was not an issue in the motion." *Ibid.* This statement in the opinion reflects mistakes of fact.

A. Appellants Raised the Litigation Privilege DIRECTLY in Two Dispositive Motions Before and at Trial

First, appellants' letter brief on the waiver issue asserted specifically that the trial court should have dismissed the action pursuant to their motion for summary

adjudication and their motion in limine (in addition to their motion for judgment on the pleadings). (Letter Brief of November 6, 2001 at pp. 5-6).

Appellants' motion for summary adjudication raised the litigation privilege as a bar to the entire cross-complaint. (*See e.g.* CR 460-463, CR 805-830, 832, 833-36). Specifically, the motion argued that the March 3, 1998 demand letter was "absolutely privileged" citing *Rothman v. Jackson*, 49 Cal. App. 4th 1134 (1996) (CR 461). The motion contained separate arguments labeled "Fjelline/Fosters Were Privileged under the Official or Administrative Proceeding Rule" (CR 461) and "Investigative Interviews Are Covered by the Judicial Proceeding Privilege" (CR 462-63). Appellants' "Objections to Opposing Party's Evidence" repeatedly raise the litigation privilege as a bar to the entire action. (CR 809, 811, 812, 814, 821, 823, 824, 825).

Appellants objected to respondents' evidence in opposition to the summary judgment motion on the basis that their statements and conduct were absolutely privileged. Specifically, respondents raised: (1) the attorney demand letter, (2) filing the unlawful detainer action and (3) preparing a proposed form of lease assignment. (CR 821-30). (Letter Brief of November 6, 2001 at p. 5). Appellants objected that these statements and conduct could not be the basis of tort damages because they were absolutely privileged.

Appellants' motion in limine also raised the litigation privilege as a complete bar to the cross-complaint and asked the trial court to make a preliminary finding that the absolute litigation privilege "prevents the litigation process from being the subject of all tort claim[s], including IIED [intentional infliction of emotional distress] . . . [w]ith the single exception of a malicious prosecution action." (CR 1501). The motion went on to argue that "The absolute litigation privilege bars actions for intentional infliction of mental distress." (CR 1502-03).

In short, the opinion is mistaken in "assuming" a fact specifically briefed at the court's direction and in misstating

the record of appellants' repeated, even desperate, attempts to foreclose tort liability based on their privileged pursuit of administrative remedies and conduct of litigation.

B. The Motion for Judgment on the Pleadings Raised the Litigation Privilege

Further, appellants' motion for judgment on the pleadings indirectly raised the litigation privilege. True, appellants were foreclosed by Code of Civil Procedure section 437(c) and Code of Civil Procedure section 1008 from renewing their motion for summary judgment.

Appellants were still adamant, however, that the cross-complaint did not state a tort cause of action. Accordingly, they asserted the litigation privilege indirectly. They argued that pursuit of legal rights accorded by the FSA could not be the basis of an action for tort damages. (CR 1328). They relied on, among other authorities, *Cantu v. Resolution Trust Corporation*, 4 Cal. App. 4th 857 (1992) "(allegations of tortiously prosecuted interpleader action not deemed sufficiently outrageous. These actions are protected by the '*litigation privilege*')." (CR 1331 (emphasis in original)).

C. Under De *Anza* Appellants Did Not Acquiesce in or Waive the Court's Error

As a matter of law, this is not a record of acquiescence in a decision by the jury of a question of law for the court. (opinion pp. 22, 27). Instead, this is a record similar to that discussed in *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890 (2001):

> The doctrine of invited error applies only "when a party by its own conduct induces the commission of error." (*Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, 212* [285 Cal.Rptr. 99, 814 P.2d 1341]; *Burckhard v. Del Monte Corp., supra*, 48 Cal.App.4th at p. 1918). It does not govern where a party proceeds in accordance with adverse rulings and " ' "endeavor[s] to make

> the best of a bad situation for which he [or she] was not responsible." ' " (*Mary M. v. City of Los Angeles, supra,* 54 Cal.3d at pp. 212-213. 94 Cal. App. 3d 908.

The trial court asked Robert McAlpin, "Anything else you want to add in addition to your points and authorities?" He said "No." (*Compare* opinion p. 27). As in *De Anza,* nothing in this colloquy indicated that McAlpin conceded that damages were available for absolutely privileged conduct or that any conduct at issue in the cross-complaint could support an award of tort damages. To the contrary, the colloquy indicates that appellants' counsel stood by his motion, which asserted that the court should make a preliminary determination that there was no issue for the jury to decide. The motion in limine essentially renewed the previous motions for summary adjudication and for judgment on the pleadings. Thereafter, during trial, McAlpin tried to make the best of a bad situation for which he was not responsible, as in *De Anza.*

Respectfully, appellants' repeated, specific efforts to have the entire action determined by the trial court as a matter of law are in stark contrast to cases in which courts of appeal have found acquiescence in trial court error. *See e.g., Sperber v. Robinson,* 26 Cal. App. 4th 736, 743 (1994) (appellant agreed that the issue of whether there was an equitable lien was for the trial court alone; agreement constitutes waiver of the issue, since appellant acquiesced in and contributed to any such error). In *Mesecher v. County of San Diego,* 9 Cal. App. 4th 1677 (1992) (opinion p. 22), defendants phrased the verdict form in such a way as to invite the jury to answer the two questions differently. By adopting such a strategy, defendants waived the right to assert error on the ground the ensuing verdicts were inconsistent. In contrast, Mr. McAlpin's motions were proper objections to any issue of law going to the jury. When he lost, he had to comply with the court's orders denying his

motions and dictating the course of trial. He never invited them, conceded their correctness or agreed with them.

The result, as already shown, was a judgment unsupported by any evidence of actionable conduct. Rehearing should be granted to reconsider the opinion in light of the record as related above and in appellants' letter brief. Appellants did not acquiesce in the jury's determination of this question of law.

V. THE CONCLUSION OF RATIFICATION SUFFICIENT TO SUPPORT INDIVIDUAL AWARDS OF PUNITIVE DAMAGES REFLECTS MISTAKES OF LAW AND OF FACT AND WAS NOT BRIEFED

Government Code section 68081 requires rehearing to be granted when the court decides a case based upon an issue, ratification, which was not proposed or briefed by any party to the proceeding. (opinion pp. 36-37). There was no evidence of ratification sufficient to meet the exacting standards of Civil Code section 3294 for the award of punitive damages against individuals for the conduct of their lawyer agent. The respondents did not propose and the parties did not brief the issue of ratification under section 3294 to support awards of *punitive* damages against Bill Foster, David Fjelline and Teresa Fjelline.

A. The Parties did not Brief "Ratification" as a Basis for Affirming Awards of Punitive Damages Against Bill Foster, David Fjelline or Teresa Fjelline

The only mention of "ratification" in the briefs was by respondents in section IV. F of their brief entitled "Appellants' argument that they were prejudiced in that the Jury heard evidence of the steps taken by the Appellants in their litigation and administrative proceedings is not supported by case law" at page 44. This section of the Respondents' Brief deals with liability for alleged intentional infliction of emotional distress. There is no discussion of

liability for punitive damages or the requirements of Civil Code section 3294 in this section of the brief.

At the point in the Respondents' Brief, where respondents argued that ratification *or agency* was sufficient to support liability for intentional infliction of emotional distress, respondents refer to RT 773-4 and 779 to show ratification of tortious conduct. At RT 773-4 Mr. Minasian (unfairly) questioned Bill Foster about the allegations of the First Amended Complaint. (RT 772). Mr. Foster responded, "I never said that." (RT 772). With respect to the contents of pleadings, he testified, "I told her to handle the matter" (RT 773) and "I didn't know that's what we did there" (RT 774). He testified, in summary, "we figured it was the right thing to do to get this matter into court as soon as we could to see what the lease meant." (RT 773-74). There was *no* discussion of advance knowledge or knowing agreement to malicious conduct.

At RT 779 there is no discussion of ratification of Linda Foster's allegedly malicious conduct by Dave Fjelline. Dave Fjelline testified that he sought only to have the court clarify legal questions (RT 784) and to have the FSA make a fair division of the subsidy money (RT 785).

Respondents did not raise ratification as a basis for affirming the punitive damages awards. (See Respondents' Brief at pp. 49-50). The parties simply did not brief the issue of what constitutes "ratification" sufficient to support an award of punitive damages under Civil Code § 3294 against clients for their attorney's torts. Respondents are entitled to rehearing on this issue.

B. Ratification Under Civil Code Section 3294 Requires More Than Mere Agency; It Requires Agreement Based on Actual Knowledge

The California Supreme Court in *White v. Ultramar, Inc.*, 21 Cal. 4th 563 (1999), recently reiterated that mere agency is insufficient to support an award of punitive

damages by quoting an early case on the purpose of punitive damages:

> "The entire basis of the doctrine of vindictive [punitive] damages is that the *person*, himself, *who is sued* has been guilty of recklessness or wickedness which amounts to a criminality that should be punished for the good of society, and as a warning to the individual; but to award such damages against the master for the criminality of the servant is to punish a man for that of which he is not guilty." (*Warner v. Southern Pacific Co.* (1896) 113 Cal. 105, 112 [45 P. 187], original italics)

In fact, neither this court nor the parties found a single (non-malicious prosecution) case upholding an award of punitive damages against an individual client based on his attorney's tortious conduct – based on ratification *or* agency.

In this case, assuming solely for the sake of argument that Linda Foster's litigation conduct could be the basis of punitive damages, there was *no* evidence of individual "wickedness" on the part of any of her clients with respect to that conduct. There was no evidence that these lay people knew in advance that she would send any letter or institute any proceeding or engage in a course of litigation conduct *maliciously*. There was no evidence that any individual appellant ratified any such wrongful conduct with actual knowledge of its malicious or wrongful nature. As the opinion recognizes, there was *no* evidence about Teresa Fjelline at all. (opinion p. 36). Absent such evidence, the award of punitive damages must be reversed. *Cruz v. Homebase*, 83 Cal. App. 4th 160 (2000).

C. The Opinion Misstates the Law with Respect to Ratification Sufficient to Support Punitive Damages

Although existing law requires evidence of a principal's ratification with actual knowledge of the

malicious conduct to support punitive damages (*Cruz v. Homebase*, 83 Cal. App. 4th 160 (2000)), the opinion states that the jury could "reasonably infer" ratification satisfying Civil Code section 3294 based solely on co-ownership of property. (opinion pp. 36-37). The opinion acknowledges that "there was no trial testimony by [or about] Teresa Fjelline." (opinion p. 36).

In this respect the opinion misstates the law. Absent evidence of actual knowledge individually attributable to the individual to be punished (and agreement), the award of punitive damages against Teresa Fjelline cannot stand. *See Cruz v. Homebase*, 83 Cal. App. 4th 160 (2000) (reversing award).

As to Bill Foster and Dave Fjelline, the opinion states that "there is evidence of ratification" (opinion p. 36) but makes no reference to any evidence (it does not exist) that Bill Foster or Dave Fjelline had actual knowledge of the allegedly malicious nature of Linda Foster's conduct. As *Palmer* and *De Anza* explain, more than mere agency is required to support an award of punitive damages against a client based on his attorney's malicious conduct. *See also Lynn v. Superior Court*, 180 Cal. App. 3d 346 (1986) (clients not responsible for attorney torts). (AOB pp. 48, 57). Accordingly, the awards of punitive damages should be reconsidered and vacated.

D. Appellants Demonstrated Reversible Error in the Award of Punitive Damages Based on the Court's Agency Instruction

In the section of their brief addressing the excessive award of punitive damages appellants relied on *Palmer v. Ted Stevens Honda, Inc.*, 193 Cal. App. 3d 530 (1987) (AOB pp. 57-58), to demonstrate the trial court's reversible error in instructing with respect to all issues *including* punitive damages that:

> Linda Smart-Foster, Guy Foster, David Fjelline and Teresa Fjelline were at all times agents of each other in undertaking the acts that have been testified to. (RT 1101-02)

The court had also instructed that, "It is not necessary that the conduct of the agent be expressly authorized by the principal or be undertaken for the benefit of the principal for such conduct to be within the scope of the agent's authority." (RT 1101). The remainder of this instruction asks the jury to determine what is proper conduct in the course of litigation, which a lay jury is not equipped to do, as explained in *De Anza*, 94 Cal. App. 4th at 918. And the court followed these instructions with an instruction on joint enterprise:

> A joint enterprise is a relationship which arises from an agreement between two or more persons to undertake some common objective for the benefit of all in pursuit of which is authorized for others, *and each has an equal right to come to govern the conduct of another with respect to* [the] common undertaking may be taken by the word [sic]. (RT 1102) (emphasis added.)

Based on these instructions, the court instructed that mere agency sufficed to support an award of punitive damages against Mrs. Foster's clients. The court instructed that, as members of the joint enterprise with a shared objective, each client had the right to control Mrs. Foster's conduct and that express authorization was not necessary to make them liable for her conduct. The jury could reasonable conclude that it had only to find that the agent's conduct was malicious in order to assess punitive damages against Bill Foster and the Fjellines. (*See* RT 1104). The agent's conduct was *deemed* to be authorized or ratified on the basis of the prior instructions. The principals' actual knowledge of or agreement to the malicious nature of the conduct was not put in issue.

With respect to the award of punitive damages against clients of an attorney whose conduct has been found to be tortious, these instructions were legally *erroneous* and deemed excepted to. Code of Civ. Proc. § 647. The failure of the appellants to have objected to the instruction or offer a proper one does not constitute a waiver. *Id.; see Agarwal v. Johnson,* 25 Cal. 3d 932, 948-949 (1979).

Here, appellants sought to have the jury decide, if the jury found that her conduct was tortious, whether, in fact, Linda Foster was acting as the clients' agent within the scope of her authority. Mr. McAlpin offered two instructions, which were not given, that would have had the jury determine the *fact* of authorization. (RT 1725, 1726)

Unlike the employer with supervisory authority over his manager in *Agarwal,* the clients of trial counsel in this case were not authorized to practice law or to control the conduct of their counsel. Counsel acts in the capacity of independent contractor, responsible for the results of her conduct and not subject to the control and direction of her clients over the details and manner of her performance. *See Merritt v. Reserve Ins. Co.,* 34 Cal. App. 3d 858, 880-81 (1973).

This independence of client from lawyer is the basis of the ruling in *Palmer v. Ted Stevens Honda, Inc.,* 193 Cal. App. 3d at 539, reversing the award of punitive damages, upon which appellants relied. (AOB p. 57). *See also, De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates,* 94 Cal.App.4th at 918 (tort damages not recoverable for litigation tactics; punitive damages may not be based on attorney's conduct). As noted above, neither the court nor the parties found any case supporting awards of punitive damages against individual clients for their attorney's tortious conduct.

Given the independence of lawyer from client, the instructions allowing awards of punitive damages based on mere agency were error.

E. The Instructional Error was Prejudicial, Especially as to Teresa Fjelline, AS to Whom There was no Evidence

The broad agency instruction was prejudicial error, in the absence of individual evidence of ratification based on actual knowledge and understanding required by Civil Code section 3294. At a minimum, the award against Teresa Fjelline must be vacated because there was no evidence as to her conduct or knowledge. (AOB p. 58).

To the extent that the jury may have agreed with Greco's theory that Mrs. Foster's "Saddam Hussein" approach to negotiation (opinion p. 8) was despicable, the awards of punitive damages against the non-lawyer cross-defendant principals were contrary to law. It is probable, given the state of the evidence and of the argument, that there would have been no awards of punitive damages against these three appellants, absent this erroneous instruction allowing imposition of punitive damages based on mere agency of Linda Foster as litigation counsel for her clients.

This evidence must be viewed in the light most favorable to the *losing* individuals against whom punitive damages were awarded. *Henderson v. Harnischfeger Corp.*, 12 Cal. 3d 663, 674 (1974). The court of appeal must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the losing appellants and rendered a verdict in their favor on those issues as to which it was misdirected.

Under *Henderson*'s test, the awards of punitive damages must be vacated. First, as detailed in the Opening Brief, Greco's entire theory of the case was that the Fosters and Fjellines should be punished for allowing their free lawyer to institute and prosecute this litigation. Greco testified that Linda Foster's conduct as an attorney was paramount and should be punished:

Q. Do you know of anything that the courts have said throughout this litigation that has indicated that Linda Smart Foster has abused her privilege?

A. This is what we're going to decide right here.

Q. So the winner or loser of the lawsuit, whoever loses has abused the law, in your mind?

A. No, that's what this single lawsuit right here, me countersuing Mrs. Foster is about. It's about her abusing her privileges as a lawyer and using those privileges as a lawyer to beat somebody into submission. (RT 689-90). (AOB p. 45).

Second, as set forth in Appellants' Opening Brief at p. 44, much of the testimony concerned Linda Foster's litigation tactics. Counsel interrogated Linda Foster about steps she took as counsel for the cross-defendants. He asked her about the March 3, 1998 letter (Ex. C) threatening to seek declaratory relief (RT 694-702) and the September 5, 1998 (Ex. S) letter seeking information from Grecos' landlords (RT 743-46). He questioned her about the allegations of the original complaint, Ex. E (RT 703, 707-08, 714-16) and the amended complaint, Ex. U (RT 704-07, 719-22, 747). Question after question asked whether the litigation was instituted for the purpose of "hammering" the Grecos (RT 717), putting financial pressure on them (RT 725, 727), putting terror into their hearts (RT 732), or creating an emotional state to give up (RT 747, 749-50).

Third, a lay jury is not in the position to assess what is permissible zealous advocacy and what crosses the line, and thereby to impose the tort sanction of punitive damages based on a litigation conduct. *De Anza*, 94 Cal. App. 4th at 732-33. "Courts and the Legislature have developed sanction and disciplinary procedures to address such conduct. And established precedent in this state has consistently held that

resorting to tort remedies is not the proper means to correct misconduct arising during litigation." *Ibid.*

Next, a significant theme of closing argument was that Linda Foster's conduct as a lawyer was despicable and should be punished. Prejudice against lawyers, especially free ones, was a major theme, calculated only to inflame the jury. (RT 1051, 1052, 1054, 1055, 1059). The analogy to lawless Colombian drug lords was outrageous. (RT 1054). (AOB p. 59).

Finally, the award of punitive damages against Teresa Fjelline, as to whom there was no trial testimony (opinion p. 36), indicates that the jury understood and accepted the direction of the erroneous instructions that mere agency or common objective sufficed to establish that Linda Foster's conduct was "authorized or ratified" for the purposes of an award of punitive damages. Since there was no testimony as to her, the jury could not have awarded punitive damages against Teresa Fjelline on any other basis. Under *Henderson,* this court should conclude that the same error infected the awards against Bill Foster and David Fjelline.

In light of respondents' emphasis throughout trial on the goal of punishing Linda Foster's conduct *as a lawyer,* erroneous instructions allowing imposition of punitive damages on Bill Foster, Dave Fjelline and Teresa Fjelline based on mere agency – in the absence of any evidence of knowing ratification of malicious conduct – was prejudicial and resulted in a miscarriage of justice.

CONCLUSION

To avoid a miscarriage of justice, the court should grant rehearing and reconsider errors of law and fact demonstrated by this petition on behalf of appellants Bill Foster, Dave and Teresa Fjelline. Alternatively, the court should publish its opinion, which addresses important questions of first impression and restricts the protection of Civil Code section 47(b) to allow, contrary to existing

precedent, an action for intentional infliction of emotional distress.

No other case in the country has held that a producer who is determined by the Farmer Services Agency to have a valid dispute concerning his proposed crop subsidy share has "the power but not the right" to pursue the FSA's exclusive administrative procedure for remedying that dispute. No other case has construed the parties' crop share lease lawfully to preclude one of the producers from pursuing the benefits and protections of the crop subsidy program. The Louisiana case upon which the opinion relies would require the opposite result: a producer breaches his lease if he prevents the other producer from taking advantage of the crop subsidy program, including the producer's rights to administrative dispute resolution.

No case in California has held that pursuit of administrative and judicial remedies supports a cause of action for intentional infliction of emotional distress. No actionable, unprivileged conduct is identified in the court's opinion. Until now, emotional distress suffered in litigation has been recoverable only in a malicious prosecution action (which, in this case, would have been barred by the FSA's finding of a valid dispute).

The cross-complaint for intentional infliction of emotional distress should have been dismissed pursuant to one of appellants' three dispositive motions because the allegedly wrongful conduct was absolutely privileged under Civil Code section 47(b). These motions negated the court's erroneous finding that appellants' invited the trial court's error in giving this question of law to the jury.

Finally, the awards of punitive damages against these three petitioners cannot stand. The issue of ratification under Civil Code section 3294 was not briefed. Gov't Code § 68081. The court's instructions allowed imposition of punitive damages based on mere agency. The jury must have so understood the instructions because, as the opinion recognizes, there was no evidence at all concerning Teresa Fjelline. Yet the jury imposed the same punitive award on

her as on the others. The court's finding that the jury could impose punitive damages upon Mrs. Fjelline based on mere co-ownership of property is a mistake of law resulting in a miscarriage of justice.

Petitioners have found no case allowing clients to suffer punitive damages on account of their attorney's litigation conduct, except in the context of malicious prosecution. The court's decision is an important and substantial departure from existing law.

Respectfully, the opinion should be reconsidered for the reasons and based on the facts and authorities cited in this petition, which were fully briefed in Appellants' Opening, Reply and Letter Briefs. Alternatively, or in addition, it should be published under the standards of California Rules of Court, rule 976(b)(1).

Dated: May 23, 2002

RIEGELS CAMPOS & KENYON LLP

/s/ Charity Kenyon

CHARITY KENYON

Attorneys for Plaintiffs, Cross-defendants and Appellants, David P. Fjelline, Teresa Reed Fjelline, and Guy William Foster

APPENDIX F (continued)

FILED
Court of Appeal Third District
California Court of Appeal
Third Appellate District
MAY 23 2002

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

DAVID P. FJELLINE, et al., Plaintiffs, Cross-defendants and Appellants v. JOHN N. GRECO, et al., Defendants, Cross-complainants and Respondents.	Case No. 3 Civil C035835 Placer County Superior Court No. SCV 6972

PETITION FOR REHEARING

Appeal from Judgment of the
Superior Court of California, County of Placer
The Honorable James D. Garbolino, Judge

LINDA FOSTER
Attorney At Law
P. O. Box 994
Lincoln, California 95648
Telephone: (916) 645-2205
In Propria Persona

Appellant, Linda Foster (having substituted in for herself alone) requests rehearing based on substantial error of law or fact and new matters determined without briefing, and requests that the Court consider important facts and legal analysis, previously briefed but not considered or documented in the Decision:

1. Question of Law: ***Can a litigant file an intentional infliction of emotional distress ("IIED") action, then, never having amended his complaint, make unplead litigation procedures and tactics the basis of his IIED action?***

Though briefed by Appellants, the Unpublished Decision neglects a description of pretrial proceedings requesting that the Court apply the litigation privilege, and it overlooks a trial, based in its entirety on litigation tactics, litigation proceedings, administrative remedies,[2] *though these constitutionally-protected acts were never plead.* The Decision neglects to show Respondent was allowed to file an IIED action, hold it in abeyance, and establish a factual basis for his claim, long after the cross-complaint was filed (and never amended), establishing his IIED claim based on litigation tactics and, indeed, the actual litigation itself.

Appellant requests that the following pretrial and trial proceedings and objections (cited in briefing) be considered in rehearing by the Court and that consideration of, and a clear description of the pretrial and trial proceedings and objections be included in the Decision.

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[2] Administrative remedies is perhaps tangentially plead, but the Decision seems to consider this but a breach of contract in its "power but not the right" analysis.

A. A Trial About Litigation Tactics[3] Was Ignored

John N. Greco testified first. Within minutes, testimony turned to the attorney demand letter (Exhibit C). Having requested dismissal (on the basis that litigation tactics were constitutionally protected in pretrial motions and having requested a 402 hearing prior to trial), Appellants' counsel, complied with the Court's order that litigation privilege would be handled on a question-by-question basis, and sought at trial to assert the litigation privilege outside the presence of the jury at side bar:

> "MR. McALPIN: Your Honor, may we approach the Bench? This is Exhibit C. (Whereupon, a conference was held at the bench; not reported.)" CR 597.

The Court Interrupted. Mr. McAlpin had clearly tried to handle the question of privilege outside the jury's hearing, but the Court announced:

> "THE COURT: *The objection, this is covered by the litigation privilege. I'll overrule this objection and Exhibit C will be admitted into evidence.*
>
> MR. McALPIN: I'd like to make this clear.
>
> THE COURT: Outside the presence of the jury, you may do that
>
> MR. McALPIN: May we approach so the –
>
> THE COURT: No. Continue while the jury is here. We'll do this outside of the jury. The record is made. *I've made the decision. I've read the exhibit, and I understand the exhibit is covered by your motions in limine, and this exhibit is coming into evidence.*" (Whereupon, Exhibit C was received into evidence.)" (Italics added) RT 597-598; Appellants' Letter Brief ("ALB") 7; AOB 14.

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[3] Appellant's Opening Brief ("AOB") 14-15, 45-47; Appellants' Reply Brief ("ARB") 22-23.

This statement of the Court operated as an instruction, a first lesson, and an "*example*" to the jury that the litigation privilege did not apply to documents such as Exhibit C. ALB 7. No limitation on the use of the evidence was given. In fact a reading of Exhibit C and a review the legal authority reveals Exhibit C is, in fact, privileged and that the Court erred.[4]

Immediately following the objection and admission of Exhibit C , John N. Greco was questioned about the injuries he sustained due to receipt of Exhibit C:

"Q What was your reaction to this letter, *physical reaction?*

A I thought: What the hell is this? I didn't know they had a *free lawyer*...

Q What was your physical reaction to that in terms of sweating, in terms of your heart, in terms of sweating, in terms of breathing?

A I got very upset. RT 598; 600-601.

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[4] As briefed, Linda Foster's litigation letters (Exs. C, F, G, J, R, T) were absolutely privileged. *See Rubin v. Green*, 4 Cal. 4th 1187 (1993); *Aronson v. Kinsella*, 58 Cal. App. 4th 254 (1997) (classic demand letter); *Rothman v. Jackson*, 49 Cal. App. 4th 1134 (1996) (demand letters and like communications between litigants or their attorneys directed toward settlement of a pending or anticipated lawsuit are privileged; citing cases); *Costa v. Superior Court*, 157 Cal. App. 3d 673 (1984); *Ascherman v. Natanson*, 23 Cal. App. 3d 861, 866 (1972) (investigatory interviews with private individuals preparatory to a hearing). The privilege applies even against a claim that a statement was improperly made to "leverage settlement." *Knoell v. Petrovich*, 76 Cal. App. 4th 164 (1999). *Knoell* explained that even an accusation of criminal conduct was protected. *A fortiori*, it protected appellants' efforts to communicate with the Grecos and their counsel, as well as with knowledgeable individuals in defense of his claims. AOB 42

Appellants' counsel then immediately turned to Exhibit F,[5] a letter between the attorneys involved in the litigation. Appellants' counsel objected based on the litigation privilege . The Court overruled the objection with no limiting instruction. Respondent was allowed to testify about the statement in the letter: "Though I have drafted causes of action regarding conflict of interest and fraud, we have elected to investigate the matters further prior to amending the complaint." RT 603.

Respondent's counsel next asked: ***"Now in addition to the lawsuit, were there actions taken by Foster and Fjelline at the ASCS."***[6] CR 604.

After the two, over-ruled objections regarding inadmissible, litigation documents, the jury heard the following testimony from John Greco:

"Q What are you thinking about during the day? The whole thing is like you're naked.

A They've got a free lawyer. She's doing all kinds of legal manipulations stuff that I don't understand. It's going very fast. Within one month we get like eight or ten documents of legal mumbo jumbo that I have no idea. . . .

Q *So what do you feel in your chest?*

A I'm not sleeping. I'm having heart pains. . . . I got guys knocking on my door handing me subpoenas, depositions, all kind – I don't even know what they were." RT 610-611

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[5] Exhibit F is, as well, inadmissible as a basis of liability, which the record clearly shows was its purpose (Mr. Greco testified he went to the hospital in July 1998 -- before the September 1998 and January 1999 letters existed). Applicable cases are cited in the foregoing footnote. *Oren* has been misapplied as set forth below.

[6] "ASCS is the former name for the USDA Farm Service Agency (FSA).

Respondents next offered the unlawful detainer 3-day notice into evidence. Appellants objected under the litigation privileged. The court instructed:

> "I will allow the jury to consider whether or not the *service of this notice* was pursuant to an overall objective that was not related to litigation. . . . [Y]ou can consider whether or not it [the three-day notice] was used *in furtherance of a plan that did not involve litigation.*" RT 610.

Respondent next sought to introduce the "results of" the actual unlawful detainer action. Appellants objected under the litigation privileged. The court ruled that the actual litigation was privileged but that:

> "You may consider, however, the *results of that action as bearing upon whether or not the defendants had the intention of committing or inflicting emotional distress as part of an overall plan.*" RT 614

The Court erred in allowing Exhibit C and Exhibit F into evidence as outlined herein and as noted in the *Oren* argument (see § 8 below). As well, "overall plan" instructions, designed by the Court, were erroneous because the "results of litigation" and "service of process" are not admissible under *Oren.*[7] (See § 8 below) The Court gave a similar instruction about USDA administrative procedures (see § 11 below) (CR 918, 943)

Over these four overruled objections, the jury heard that Mr. Greco went to the hospital in July 1998 (Exhibit 30) (*months before the September 1998 letter between attorneys and January 1999 investigatory letter to landowners existed*:

"Q Now, as we moved into July, did ***the litigation*** and

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[7] The Decision incorrectly reports the results of the unlawful detainer trial. The results were that the determination was "deferred" to the declaratory relief action and "no decision made". Ex. 18; RT 616

the issues regarding the Surmon lease continue?

A Yes.

Q And would you describe to us what happened on the evening, I believe it's July 18th, of '98?

A My wife and I went to bed . . – I woke up or I couldn't sleep. . . . I kind of couldn't breathe . . . it kept getting harder and harder to breathe. I was thinking about what these people were trying to do to me and my family. So I got up and I thought: I can't breathe, and I started having a chest pain. Nothing, you know. . . . Things got worse. I got tighter and tighter and tighter. My chest was like pounding and I felt it was filling up from the inside out like blowing up, kind of just like blowing up." RT 617.

And the jury heard that *what was causing* Mr. Greco stress: ***"The fear of being sued."*** RT 625. (Medical records at Ex. 30).

The jury heard evidence that Respondent's avowed purpose for the cross-complaint was to punish for litigation,[8] (though he filed his cross-complaint in April 1998 only a month after litigation began). AOB 45; RT 689-90.

During the proceedings, Greco' testified he had been sued by a free lawyer[9] no less than thirteen times -- despite

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[8] Q. Do you know of anything that the courts have said throughout this litigation that has indicated that Linda Smart Foster has abused her privilege?

A. This is what we're going to decide right here.

Q. So the winner or loser of the lawsuit, whoever loses has abused the law, in your mind?

A. *No, that's what this single lawsuit right here, me countersuing Mrs. Foster is about. It's about her abusing her privileges as a lawyer and using those privileges as a lawyer to beat somebody into submission.*

[9] The court ruled that defense counsel's contingency-fee arrangement, rendering him in essence a "free lawyer," was not relevant and instructed the jury to disregard this testimony. (RT 684).

the fact that he was being represented by a contingent fee lawyer. RT 670. He told the jury he had been sued an innumerable number of times. He testified that legal mumbo jumbo, subpoenas, and different legal proceedings caused him distress. (RT 412, 598, 600, 601, 610, 619, 624, 638, 677-78, 688). He complained that when you happen to tangle with a lawyer, they can start "jerking your strings." (RT 688).

Lorraine Greco had the same complaints. Her stress was caused by the litigation. (RT 800, 801). She was anxious about going to the post office because there might be more legal papers. (RT 802). She conceded that the Grecos had in turn threatened all of the appellants' assets (RT 811), but she did not think the legal system was set up for that *"form of negotiation."* She was stressed about having to answer interrogatories. (RT 810, 816). She had to live with the lawsuit every day. (RT 817).

Respondents' Counsel interrogated Linda Foster about steps she took as counsel for the cross-defendants. He asked her what her purpose in filing the action was. (RT 720) He asked her about the attorney demand letter (Ex. C) and a letter between the attorneys in a lawsuit (Ex. S), which were inadmissible to show liability but admitted over objection.[10] RT 694-702; RT 743-46. He questioned her about the allegations of the original complaint, Ex. E (RT 703, 707-08, 714-16) and the amended complaint, Ex. U (RT 704-07, 719-22, 747). She was asked "so really was the lawsuit . . . designed to drive the Grecos into a settlement of this." CR 706. Question after question asked whether the litigation was instituted for the purpose of "hammering" the Grecos into submission. (RT 717).

Counsel's questioning of Guy Foster posited the theory that the litigation represented "459 days in an attempt

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[10] These letters are inadmissible as a basis of liability, which the record clearly shows was its purpose (Mr. Greco testified he went to the hospital in July 1998 -- before the September 1998 and January 1999 letters existed). Applicable cases are cited footnote 3. *Oren* has been misapplied as set forth below.

to get out of this lease." (RT 758). Since the delay was for trial of the Grecos' cross action, this was particularly unfair. Guy Foster (not a lawyer) was unfairly questioned about the allegations of the First Amended Complaint. (RT 772). He testified, in summary, "we figured it was the right thing to do to get this matter into court as soon as we could to see what the lease meant." (RT 773-74).

The foregoing resulted in a trial fundamentally flawed. Respondent was, in fact, allowed to make his IIED cross-complaint based on litigation procedures and documents within these proceedings which occurred *after* the cross-complaint was filed (and never amended) and after discovery was closed. Appellants suffered a severe injustice and were punished for filing a stream of documents *in an attempt to defend themselves* (commencing with the filing of the summary judgment motion at page 373 of the court record and ending at page 1982). They had their valid objections to constitutionally protected documents (to show liability) ignored.

B. Appellants' Pretrial Efforts To Assert the Litigation Privilege and Obtain a Statement of the Charges Against Them

The Decision mentions Appellants' pretrial and in limine motions but does not correctly record the motions nor understand the profound effect they had on waiver.

i. Motion for Summary Adjudication - Respondents Respond that Litigation Procedures and Documents are the Basis of IIED Claim[11]

Appellants' would never have known of Respondents' plan to make litigation procedures the basis of their claim – but for Appellants' filing of their summary adjudication motion ("MSJ"). Respondents had no support for his defamation cross-complaint – all Respondents' witnesses signed declarations *for Appellants* stating

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[11] Appellants Letter Brief p. 5.

Appellants did not utter the alleged defamatory remarks.

Respondents "additional disputed facts," asserted the following formed the basis of his IIED cross-complaint: (1) the attorney demand letter,[12] (2) a lease assignment form and (3) actual court proceedings and administrative procedures. Appellants' Letter Brief ("ALB") 5.

Despite the fact that only these litigation-privilege-protected disputed facts remained and despite the fact that Appellants asserted the litigation privilege in response these disputed facts, Respondents IIED action was allowed to proceed. CR 815-828 (IIED final statement of disputed facts). ALB 5.

ii. Motion for Judgment on the Pleadings

Respondents examined the pleadings and determined that nothing actionable had been plead – bad faith breach of contract allegations and dismissed defamation allegations cannot form the basis of an IIED claim. Court denied the motion and threatened sanctions for its filing. ALB 6.

Under this set of facts, Respondents' IIED action went to trial based only on the *dismissed* defamation and *bad faith breach of contract allegations*.[13] ALB 5-6

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[12] The summary judgment motion was filed on November 12, 1998, before much of the litigation procedures Respondent presented at trial occurred.

[13] The Decision held the following sufficient factual pleadings to state a cause of action for IIED:

A. ***Bad Faith Breach of Contract Allegations:*** Appellants made a *disingenuous claim to the water supply*; and Appellants without legitimate basis *disputed allocation of agricultural subsidies*. . . . all for the purpose of denying cross-complainants benefits to which they are entitled under the lease agreement."

iii. The Motion for Judgment On the Pleadings Tells A Tale of the Predicament in Which Appellants Found Themselves and Why Waiver Should Not Apply

Ironically, Appellant plead with the Court (at the motion for judgment on the pleadings) that Respondents be required to state their claim and informed Appellants of the charges to which they must respond: She stated:

> *"What are the allegations against us?. . .*
>
> Do we not deserve the right to have them [the outrageous conduct] alleged?... If the Court does not state what conduct is actionable under intentional infliction of emotional distress but leaves us to wonder

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B. ***Dismissed Defamation Allegations:***

Allegations	**Status**
"15. . . . Cross-complainants . . . published statements defamatory of cross-complainants, to wit: *Cross-complainant had defrauded cross-defendants' predecessor; cross-complainants had taken unfair advantage of cross-defendants' predecessor; cross-complainants had "screwed" cross-defendants; cross-complainants were crooks; and cross-complainant John N. Greco had unlawfully used his position on the Placer-Nevada-El Dorado Farm Service Agency Committee for his own personal gain to the detriment of cross-defendants' predecessor and cross-defendants. . .*	***Dismissed*** *in Summary Judgment Motion* *Respondent presented no evidence to support defamation.* Respondents' witnesses testified for Appellants stating nothing was uttered.

C. ***Factually-Void Intentional Infliction of Emotional Distress Allegations****: No factual allegations were made. The claim only* ***"incorporated by reference"*** *above allegations. This case thus went to trial on bad faith breach of contract allegations and dismissed defamation allegations.*

> just what it is, would it not be an aberration of justice if Mr. Greco is allowed to amend his pleadings according to proof at trial? . . . The implication seems to be that cross-complainant will not be held to the pleadings which are defective under current law. . . .
>
> I would like to suggest to the Court that if this happens, my kind, dutiful, hard-working husband of just a few years, who was saved from death by a kidney transplant in 1990 and who Mr. Manasian, without proof called an investor in trial and yes, he does have a home. He has a half interest in a small business and he has his dream now, his farm. He has that property not because he makes much money because he doesn't. He has lived a lifestyle of near depravation rarely buying anything new, always using his mechanical talents to fix something others would have discarded. He is still driving the same car for 27 years.
>
> To get back to my point, my husband will be held helpless to protect his hard-earned life savings from ***ambush at trial*** **and** ***indeed perjured testimony if we are not informed of the allegations against us and if Mr. Greco is not held to the pleadings.*** CR 383-84.

iv. Appellants Seek a 402 Hearing on the Litigation Privilege Outside the Presence of the Jury

With all pretrial remedies exhausted, Appellants at trial sought a 402 hearing, seeking to keep litigation-procedures from the jury.[14] The Court ordered, as a result of this hearing, that potentially litigation-privileged evidence would be ruled on a "question-by-question" basis. Appellants complied with that Order.

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[14] Points which were missed regarding waiver are briefed at ALB 3-8.

2. **The Decision Erred in Finding Waiver for the Following Reasons:**

A. Appellants were Forced to Submit the Matter to the Jury because The Trial Court's MSJ Order, Found Actionable "Conduct" in (1)an Attorney Demand Letter; (2) Actual Court Proceedings; (4) Taking Advantage of USDA Administrative Procedures; and (5) Fraud Cause of Action Assignment Form

As pointed out in Appellants' Letter Brief but missed in the Decision, the Court found actionable "conduct," (ALR 6), under *Kimmel,*[15] long before trial began in (1)an attorney demand letter (Ex. C); (2) actual court proceedings; (4) taking advantage of USDA administrative procedures; and (5) fraud cause of action assignment form (Ex. T). CR 805-831. ALB 5-6.

The Court's finding of "conduct," as opposed to "statements" requires that waiver cannot apply to this case because "conduct" is a jury question. This point was overlooked. As the Court ruled there was actionable "conduct" in (1) the disputed facts which survived after MSJ (all of which involved litigation and administrative proceedings) and, as argued by Respondents' counsel, and (2) items enumerated in the motion in limine (all litigation-privileged proceedings and documents), *Appellants had no choice but to submit the matter to the jury. They were forced to do so by the Court's error in pretrial motions.* The jury instruction and special verdict were protective devices in face of this error.

The Decision does not analyze the significance of the pretrial motions asserting the privilege and seeking to require Respondents to plead their case, and the *unfairness in requiring Appellants to respond to unplead litigation tactics*.

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[15] Decision at pages 24-25 cites *Kimmel v. Goland* (1990) 51 Cal.3d 202, 211; *Ribas v. Clark* (1985) 38 Cal.3d 355, 358, 365 and *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 482

B. The Record Shows Appellants were in a State of Confusion as to the Charges Against Them, Then Submitted to the Court's Order that Respondents Would be Allowed to Make Their Case on "Conduct" in Litigation Procedures and Tactics

Because § 437 does not allow a second MSJ and because, after dismissal of defamation, the only factual allegations left in cross-complaint were bad faith breach of contract and *dismissed defamation* factual allegations, Appellant next asked the Court to look at the pleadings and determine whether an actionable tort was plead. As noted below, Appellant Linda Foster plead with the Court that they would not be able to produce witnesses at trial if Respondents were not required to plead the outrageous act. They could not retain expert witnesses, who might aid a lay jury in understanding complicated issues. They could not conduct discovery. They could not protect themselves against perjury and ambush at trial.

As shown above, Appellants finally learned what the Greco's action was about. They learned at trial. It was about the attorney demand letter, letters between counsel involved in the litigation, filing an unlawful detainer action, seeking administrative remedies, and an investigatory letter.

The Court denied the motion for judgment on the pleadings, and as well, threatened sanctions for bringing the motion.[16]

Appellants sought a Writ of Mandate, asserting that Respondents must be required to factually plead their case under CCP 425.10(a) and that bad faith breach of contract allegations and dismissed defamation allegations – ***dismissed because witnesses testified Appellants did not utter the defamatory phrases not because the defamatory phrases missed a criteria for being actionable defamation*** – cannot form the basis of IIED. Of course the basis for denial was not disclosed.

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[16] CR 1468.

Appellants had the door shut on them once again. The concluding words in this Writ petition were:

> "Petitioners do not know what allegations they are to answer at the trial on November 30, 1999. Are they to prepare to respond to defamation allegation,[17] though dismissed by Judge Roeder? Are they to search the Court transcript of the breach of contract trial and guess at what Respondent Court might have been thinking when it said *"facts before the Court in the bifurcated proceedings . . are sufficient to defeat the motion for judgment on the pleadings"*? [18]
>
> Or are they to trust the system and believe that they will not be required to answer allegations not plead and that they will not be required to respond to dismissed allegations – then just take the chance of being ambushed, ill-prepared, and without witnesses at trial?
>
> Respondent Court's puzzling ruling of October 12, 1999, places the Petitioners in this position. Must Petitioners go to trial not knowing what allegations

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[17] The Order held that the dismissed factual allegations in the defamation claim were "incorporated by reference" and hence could form the basis of IIED. The Order neglects to understand that Respondents' witnesses stated Appellants had not made the statements alleged in the complaint. The defamation was not dismissed on a technical ground such as the a utterances were true but nonetheless harmful. CR 1468; Writ 3 CIV C034080.

[18] In addition to finding the dismissed defamation allegations actionable, the court found that "*facts before the Court in the bifurcated proceedings . . are sufficient to defeat the motion for judgment on the pleadings.*" CR 1468; Writ 3 CIV C034080.

they must meet?" Petition for Writ of Mandate[19] p. 15.

These words tell the story of how Appellants finally came to the conclusion that this case would be tried based on litigation procedures and tactics and that there was nothing Appellants could do about it but prepare as best they could.

They had exhausted all remedies to require Respondents to factually plead their case as required by CCP § 425.10(a). They must now prepare for a trial.

C. With All Doors Closed, Appellants Reexamined the MSJ Disputed Facts and Order For the Factual Basis of Respondents' Claim - The Trial Was Imminent

At this point Appellants had no choice but to attempt to prepare their case based on anything and everything they could find which might give them a cue as to what charges they might be required to respond to.

Clearly, after Appellants pleas, nearly tearful cries, for guidance as to what charges they must meet, Appellants reviewed the MSJ and its Order.[20] There they found that the only allegations which survived summary adjudication were:

(1) Attorney Demand Letter (Exhibit C);
(2) filing injunction in this action;
(3) filing unlawful detainer action;
(4) putting subsidy shares "in dispute" under USDA procedures;

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[19] Points and Authorities are separately bound could easily be confused with Petition.

[20] The statement of disputed and undisputed facts (which was entitled "Objections to Opposing Parties Evidence" is at CR 805-831.

(5) preparing a lease assignment form in anticipation of litigation which had an assignment of fraud cause of action.[21]

The combination of the disputed facts which survived MSJ and the Court's order finding actionable "conduct" apart from defamation spoke to the Appellants and informed them the Court was probably going to allow Respondents to try their IIED action based on the above-stated litigation procedures.

Appellants had to assume these items would be the subject of the upcoming jury trial. They had to protect themselves in every way they could. They chose to file both a motion in limine, seeking once again to stop this matter from going to trial based upon litigation procedures. And simultaneously they filed a jury instruction (required by Local Rule to be filed prior to trial) and special verdict form which might at least give the jury information that litigation cannot form the basis of IIED, though the lay jury was woefully ill-prepared for the task.

The Decision neglects to consider that if the motion in limine was unsuccessful and some litigation tactics were allowed to go to the jury, that a litigation privilege jury instruction and appropriate verdict form would be necessary and that it was Respondents' contention all along that there was actionable "conduct" apart from speech. But instead the Decision finds waiver in complying with Local Rules requiring that these documents be submitted prior to trial and preparing for an adverse ruling (which adverse ruling they in fact got). This is unfair. It leaves Appellants in a position that protected themselves is punished by a finding of waiver.

The Court should have held the requested 402 hearing and kept out evidence of all court procedures which it did not find "so palpably irrelevant that no one could

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[21] Notably, the September 1998 letter and the January 1999 letters are omitted.

doubt its impropriety," – then given those matters which it found actionable, and those matters alone, to the jury.

Instead, the Court ordered that it would rule on whether or not litigation documents were actionable (presumably before the jury as the Court in fact did) on a question-by-question basis.

D. Mr. McAlpin's Considered-But-a-Second "No" Versus a File Filled With Assertions That the Court Should Keep Matters Protected by the Privilege From the Jury's Eyes

The Decision does not appear to understand the confusion under which Robert McAlpin was operating (as outlined above) in responding to Respondents' argument that some litigation conduct is actionable. Appellants did not know the allegations against them. They had squarely knocked out Respondents' defamation action, yet it seemed it was going to be tried anyway. They filed a motion in limine asking if defamation was going to be tried and requesting that matters not plead not be tried. CR 1509-1511. They had an clue litigation tactics might be the subject of the action, but nothing was plead. Respondents' trial brief on the subject of "conduct" in litigation was filed that morning.[22] Mr. McAlpin did not have an opportunity to review Respondents' brief on "conduct" in litigation which is actionable, and therefore was not in a position to respond, which may be the reason Mr. McAlpin's (now deceased) "no." response. CR 1577; RT 411; ALB 1; 6.

Equally importantly, however, the Decision does not quote the question to which Mr. McAlpin responded "No," which momentary response has had a profound effect upon the Decision:[23]

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[22] "We have a trial brief for the Court that will help the Court digest the current status of the cases on this subject." CR 411

[23] MR. MINASIAN: Yes, Your Honor, I do oppose. Your Honor, we'll take care of this by the instructions to the jury with regard to the litigation privilege. There can be no fine line drawn in advance

The question was not: "do you agree?" . . . "do you have any comments upon that procedure?" Or even "Your response, Mr. McAlpin."

The exact quote of the question asked of Robert McAlpin was: ***"Anything else you want to add in addition to the Points and Authorities?"***[24]

Mr. McAlpin was not agreeing with Respondents' argument or his procedural suggestion. Mr. McAlpin was responding to the question he was asked. In other words he was responding: "I will stand on the arguments in my points and authorities," which reference is to the motion in limine at 1501-1503 of the court record. Those points and authorities requested a 402 hearing, outside the presence of the jury, prior to trial. The 402 hearings was denied. The Court required litigation privilege objections be made in front of the jury, stating:

> "Denied. This will be ruled upon on a question by question basis. Whether some "conduct" is protected will depend upon the context and the questions sought to be asked."

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between evidence in regard to conduct which does not exist under the litigation privilege from statements made in the litigation which are subject to the privilege that attorneys have in regard to the conduct of litigation. The Court will take care of this by its instructions. That's the historic way in which matters of ID are tried in regard to circumstances which eventually are brought in a litigation format. . . . We have a trial brief for the Court that will help the Court digest the current status of the cases on this subject.
THE COURT:
Mr. McAlpin, anything else you want to add in addition to the Points and Authorities?
MR. McALPIN: No.

[24] CR 410-11

The Order on the MSJ and the Court's in limine Order forced Appellants to try inadmissible litigation tactics in front of the jury, in violation of *De Anza*.

Failure to give Appellants their 402 hearing, failure to notify Appellants of the charges against them, and failure to correctly rule on objections resulted in a fatally-flawed trial where litigation tactics were allowed to be the basis of an IIED action – though never plead.

E. Appellants Continue Objecting To Respondents' IIED Action Being Proven Based on Unplead Litigation Tactics at Trial

The trial (detailed in § 1(A) above) began. It is with full knowledge of the motions and Writ referenced in Appellants' Letter Brief, that further objections at trial must be judged.

After unsuccessfully in every pretrial and in limine effort to keep litigation tactics out, Robert McAlpin complied with the Court's Order and objected at his very first opportunity. As outlined above, the first objection came within minutes of the first witness (John Greco) taking the stand.

Mr. McAlpin objected to the attorney demand letter (Ex. C), attempting to handle the matter at side bar. (The result of his objection was an instruction to the jury that it was not protected by the litigation privilege.

Mr. McAlpin objected to Exhibit F (letter between counsel – clearly privileged to show liability). The objection was overruled.

Mr. McAlpin objected to the unlawful detainer 3-day notice. The Court instructed "service" of the 3-day notice could be considered to show intent.

Mr. McAlpin objected to the unlawful detainer action itself. The Court instructed that the "results of" this actual court proceeding could be considered to show an *"defendants*

had the intention of committing or inflicting emotional distress as part of an overall plan."[25]

These continued objections were the only way Appellants had of protecting themselves in face of the adverse rulings and the Court's specific order that potentially-litigation-privileged evidence would be ruled on a question-by-question basis.

These objections at trial are wholly inconsistent with waiver. They came after the "No" response to the question "*do you have anything to add to your points and authorities*," which the Decision has found to be consistent with acquiesce. A litigant who acquiesces does not continue objecting via the only means the Court left open (The Court will rule on a question-by-question basis).

The Decision cites *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212, which states:

> "But the doctrine does not apply when a party, while making the appropriate objections, acquiesces in a judicial determination. (People v. Perez, supra, 23 Cal.3d at p. 550, fn. 3.) As this court has explained: " 'An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, {Page 54 Cal.3d 213} does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible.' " (People v. Calio (1986) 42 Cal.3d 639, 643, quoting Leibman v. Curtis (1955) 138 Cal.App.2d 222, 225.)"

In *Perez* objections were made then counsel stated ""I would be forced to agree at this point." Nonetheless, *Perez* found no waiver because in the statement "I would be forced

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[25] See § 1(A) above for a detailed description of each of the described objections.

to agree at this point," counsel did not by "his own conduct induce[s] the commission of error."

Had Appellants submitted a litigation privilege instruction and a special verdict form *and* never attempted to show the Court that litigation procedures and documents cannot form the basis of IIED, waiver would apply. But that is not what happened in this case. As outlined in sections 2(A)-(F) and 1(A) (B) above, Appellants asserted the privilege at their very first opportunity which *unfortunately* was not in the cross-complaint but in the MSJ "Additional Disputed Facts." That was denied. Being unable to bring a second MSJ, they asked that the Court require more than bad faith breach of contract and *dismissed* defamation allegations to support IIED. That was denied. They asked the Court to determine that litigation procedures and documents were not admissible to show IIED outside the presence of the jury. That was denied. They asked for a side bar to keep litigation documents out of the IIED trial. That was denied.

This is not consistent with a party acquiescing. It is consistent with a party attempting, in any way possible, to protect against an erroneous Order of the Court.

Appellants objected until their voice was raspy and raw – but no one listened and heard that Respondent was being allowed to present a case based on unplead litigation tactics and that such violates our Constitution.

As briefed in Appellants' Letter Brief, Appellants request that the Decision be corrected to record what occurred in these pretrial and motion in limine motions and how they affected Robert McAlpin's actions at trial and that a rehearing on this matter be granted.

3. Rules of Law in *De Anza Santa Cruz Mobile Estates Homeowners Assn.* (2001) Have Not Been Considered

Appellants request that the Decision consider the new case *De Anza Santa Cruz Mobile Estates Homeowners Assn.* v. *De Anza Santa Cruz Mobile Estates* 94 Cal. App. 4th 890.[26] *De Anza* repeatedly holds that litigation tactics are an improper subject for jury determination. *De Anza* 918-921.

As shown in § 1(A), this was a case filled to the brim with evidence of litigation tactics. It started with questions about the attorney demand letter, admitted over objection with no limitation, and immediately turned to "What was you physical reaction to the letter." Then another litigation letter between the attorneys involved in the lawsuit was admitted over objection with no limitation. Then immediately after these overruled objections, John Greco testified about going to the hospital and having heart pain ("it kept getting harder and harder to breathe. . . Things got worse. I got tighter and tighter and tighter. My chest was like pounding and I felt it was filling up from the inside out like blowing up, kind of just blowing up") in July 1998 (before the September 1998 and January 1999 letter existed). The Court gave erroneous limiting instructions about the "overall plan" to inflict emotional distress as described in § 8 below and the "power but not the right" as described in § 9 below.

The Court fundamentally erred in admitting litigation-tactic evidence to prove IIED under *De Anza*. Appellants were, thus, denied their right to a fair trial.

Further, De Anza holds "we find that punitive damages in a tort action cannot be based on evidence of defendants' litigation conduct *occurring subsequent to the underlying tort*, and cannot be based on claims that defendants filed motions, appeals and other proceedings authorized by law." *De Anza* at 918. Many cases have

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[26] Cited by Appellants as a case decided after briefing.

found evidence of litigation tactics so prejudicial that they infect the integrity of the whole trial. Yet, *De Anza* shows no record, as do the Appellants in this case, of seeking to dismiss of the case prior to trial based upon the litigation privilege. If a motion in limine was filed in *De Anza*, it is not mentioned. If any objections were made in *De Anza* at trial, they are not mentioned.

Appellant requests that the Court reconsider the Decision in light of the new holdings in *De* Anza and document the above relevant facts regarding waiver.

4. ***Question of Law: Can A Jury Be Expected To Understand the Litigation Privilege Instruction As Given?***

The Decision finds the litigation privilege jury instruction sufficient but neglects to recite what it said and incorrectly reports the time that it was given.

Contrary to the Decision, the instruction was given at 3:45 p.m. (AOB 6; RT 1113), with the verdict being rendered at 4:45 p.m. (AOB 6; RT 1116).

The Instruction the Court drafted is incomprehensible to a layperson. It stated:

> A privileged statement, publication or broadcast is one made in any judicial or administrative proceedings. It is an absolute privilege and extends to most types of lawsuits, including the intentional infliction of emotional distress.
>
> By being privileged, any communication which is covered by the privilege may not be considered in any way as contributing to the basis for liability for intentional infliction of emotional distress if the communication was made:
>
> One, to achieve the object or in furtherance of litigation; and, two, must have some connection or logical relation to the action.

Now, the term object or in furtherance of litigation means a party's legitimate objective in the litigation, for a plaintiff, achieving the relief sought; for a defendant, resisting a determination of liability and whatever damages or relief which the plaintiff seeks.

In furtherance of litigation is not a test of the motives, morals, ethics or intent of the person claiming the privilege.

Some connection or logical relation to the action means that there must be a functional connection.

It's not enough that the statement bear a connection or logical relation to the litigation.

The connection must function as a necessary or useful step in the litigation process.

Although the privilege may apply to pre-litigation statements it is limited in that context.

The mere possibility that a lawsuit might be filed is insufficient for application of the privilege. There must be a real, contemplated lawsuit; the verbal proposal of litigation must be made in good faith.

The threat of a lawsuit is not privileged if the threat is just a negotiating tactic and not a serious proposal made in good faith in contemplation of going to court.

The contemplated litigation must be imminent.

The litigation privilege applies whether or not the statement is made in pleadings or in the courtroom and whether or not any function of the court or its officers is involved.

The privilege applies in actual court proceedings, commencement of the lawsuit, service of papers, depositions, interrogatories, investigative procedures, written communications and other matters which are

connected with or have some logical relation to a lawsuit.

Statements made [to] inform non-participants in the action are generally not privileged.

The privilege does not apply to a person's conduct or actions. In order to establish that communications or statements are privileged under the litigation privilege, the following elements must be established.

And, therefore, I'll do this. Number one, a statement is made in a judicial or administrative proceeding. Two, the statement is made by a litigant or other participant authorized by law to participate in the proceeding. Three, the statements are made to achieve the objects of the litigation. And, four, the statements have some connection or logical relationship to the judicial or administrative proceeding.

The persons asserting the privilege have the burden of proving the applicability of the privilege to their statements by a preponderance of the evidence.

The term preponderance of the evidence is defined elsewhere in these instructions." (RT 1113, 1115) AOB 53-54.

Appellants requested an instruction, which attempted to speak to a jury, not lawyers. It contained the critical language (cited as the rule of law in the Decision): "so palpably irrelevant to the subject matter of the action . . . that no reasonable man can doubt the irrelevancy and impropriety." It did not contain the misleading statement: "*Statements made [to] inform non-participants in the action are generally not privileged,*" which is prejudicially misleading to a lay jury, particularly under the facts of this case.

Appellants' requested instruction was:

"You must not award damages for any emotional distress which the parties suffered by reason of the lawsuit, actual court proceedings, service of papers, depositions,

interrogatories, investigative procedures, written communications and other matters which are "connected with, or have some logical relation to, the lawsuit," (including the declaratory relief action, the constructive fraud action, the unlawful detainer action, and also matters the parties were investigating which might lead to admissible evidence including, but not limited to, a witness' lacks veracity). These actions are privileged and cannot form the basis of the intentional infliction of emotional distress action you are trying.

You can only award damages for communications which are "so palpably irrelevant to the subject matter of the action (including the declaratory relief action, the constructive fraud action, the unlawful detainer action, and also matters the parties were investigating which might lead to admissible evidence including, but not limited to, a witness' lacks veracity) that no reasonable man can doubt the irrelevancy and impropriety.

Administrative proceedings as well subject to this privilege"

CR 1745-46 (See Declaration of McAlpin (CR 1694-95) regarding cross-defendants' jury instructions.) AOB 54.

Under the new case *De Anza,* Appellants request that the Decision consider the propriety of the instruction "drafted by the Court." Appellant further requests that the Decision record and analyze the critical differences between the Court's instructions and that requested by Appellants.

5. Question of Law: Can a Decision *Confirm a Punitive Damage Award Based on Litigation Tactics When There is No Evidence Whatsoever The Client Said or Did Anything Except Be A Co-Owner?*

Perplexingly, the Decision, *without any legal reasoning or citation,* confirms a judgment against Teresa Reed Fjelline for compensatory and punitive damages, stating only that

she was a co-owner of the property. As briefed (AOB 57) no evidence was admitted that Teresa Reed Fjelline said or did anything

The jury has awarded compensatory and punitive damages based on no evidence whatsoever. *Palmer* holds that a client is not liable for the acts of his attorney. Civil Code Section 3294 has specific criteria for awarding punitive damages. Being a co-owner is not listed in § 3294. The proposition that a punitive damages award could be allowed to stand without any evidence whatsoever that an individual said or did anything tears at the integrity of our judicial system. Appellant request rehearing and publication on this issue.

6. **The Court Took the Issue of Client's Ratification of an Attorney's Acts From the Jury, By Refusing Appellants' Offered Instruction and Verdict Form and, Instead, Giving Respondent's Jury Instruction, Which "Directed Ratification Was Present"**

Though briefed (AOB 59), the Decision neglects to report the contents of the agency jury instruction, offered by Respondents, and given by the Court, which took the issue of agency from the jury and directed that agency existed (that is, if the jury found one Appellant guilty of IIED, all were guilty). The Decision neglects that Appellants offered not only a special verdict form (which the Court "denied") under which liability is determined separately for each cross-defendant,[27] but submitted a standard BAJI agency instruction (BAJI 13.07). CR 1613-19; 1725-26. (See Declaration of McAlpin (CR 1694-95).

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[27] "The Landlords' special verdict asked, as to each cross-defendant: (1) "Did cross-defendant . . . engage in outrageous, *unprivileged* conduct?" and (2) "Did such outrageous, *unprivileged* conduct of cross-defendant . . . cause the emotional distress suffered by cross-complainant JOHN N. GRECO?"

As briefed (AOB 59), the Court gave the following instruction, requested by Respondents, which directing joint liability:

> The court instructs you that Linda Smart-Foster, Guy Foster, David Fjelline and Teresa Fjelline were at all times agents of each other in undertaking the acts which have been testified to. CR 1101-02

Thus, though ratification was a critical issue in this trial and though Appellants had requested a jury trial, the Court took the matter from the jury and instructed that all would be guilty if one was guilty, rendering a judgment for a quarter of a million dollars against non-attorneys for the litigation tactics of their attorney. As briefed, this violates *Palmer v. Ted Stevens Honda, Inc.*, 193 Cal. App. 3d 530, 539 (1987) and violated my client's right to trial by jury. AOB 59.

Appellants request that these matters be documented in the Decision, that the instruction given by the Court be accurately described or quoted, and that the Court consider this matter for rehearing.

7. The Decision Incorrectly Reports the Facts in Three, Important Instances.

A. Respondents Were Never On the Land

Important distinctions in the law are made between commercial and residential leases and, as well quiet enjoyment of a property.

The Decision reports "The Tenants' theory of liability was that the Landlords' actions demonstrated a course of conduct, apart from statements made in the litigation, intended to cause the Grecos emotional distress and drive them off the land." This statement, without correctly reporting the facts, is misleading and in an area of importance under the law. The record reflects that Respondents were never "on the land," save for on short walk and a second time for the purpose of signing a claim for crop loss due "100% because of excessive rains" RT 86. The record reflects that Respondents never took possession

of the land, but only collected agricultural subsidies and crop insurance on the land.

B. Nothing in the Evidence Supports a Finding of Stalking

Stalking might be construed as a tort. The Decision reports "Greco believed Fjelline was stalking him by stopping at Brown's house." The jury could not reasonably have concluded stalking existed. Greco admitted Fjelline knew Brown, that they spoke about the lease when Fjelline came by Brown's house, and that Greco invited Fjelline to his house on a later date ("You invited this person stalking you, invited him into your home? A Yes.") RT 657-659

Appellant requests that this statement be stricken from the Decision or the true evidence explained, as it is misleading on an important issue.

C. Circumstances Surrounding Linda Foster's Writing the Investigative Letter to Landowners and Testimony as to Her Reasons for Writing it Are not Correctly Reported

Though the Decision seems to conclude the jury could have found that the investigative letter to the landowners (Ex. R) was tortious, it incorrectly reports the reasons (briefed and in testimony) for writing the investigative letter to Respondents' landowners. CR 78-87; Ex. 12, p.5; ARB 26. The Decision also neglects to report that Appellants sought disclosure of Respondents' landowners in discovery and that the Court ordered those names disclosed. CR 332; 468-69; RT 730.

The Decision states but one reason given for the letter to Respondents' landowners, that is, to support the constructive fraud cause of action. In fact, there was further important testimony which showed the following:

> "Mr. Minasian, you had filed an action threatening to take everything my husband's worked for all his life. We were just married a year before this happened."

"I wanted evidence for this case. It was for the same purpose we contacted those defamation witnesses which all said there had been no defamation. That's why it was dropped." CR 727

"I wanted to know if he was just planting part of other people's land and taking all the subsidy off of it. I wanted to know if he was letting other landowners know the rules." CR 729

The Decision neglects that Respondent attempts to assert that the statement "took advantage of " an 83-year-old widow" was the subject of Respondent's action and that if it was true that Respondent was taking advantage of elderly landowners, this would be admissible. The Decision neglects that evidence that Respondent had a pattern of obtaining crop share leases, then not planting, (which makes the landowner's profits plummet and the tenant's profits stay the same [or even increase if he can get crop insurance proceeds as well], but without doing any work) would be admissible. The Decision neglects that Appellants could only get this evidence from other landowners with which Respondent dealt.

Appellant requests that the testified reasons for the investigatory letter to landowners be correctly documented in the Decision.

8. **Question of Law:** ***Can the Court instruct that evidence of actual litigation, service of process, the results of litigation, can be considered to show an "overall plan" to inflict emotional distress despite the fact that this was not a malicious prosecution action?***

The Decision erroneously applies *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157 to the trial Court's sua sponte instructions that litigation procedures are admissible to show an "overall plan" or "intent" to inflict emotional distress.

The Decision does not recognize the important distinction between the abuse of process action in *Oren* and the intentional infliction of emotional distress action here. There are but two tort actions which allow litigation procedures to be displayed to the jury without an action terminated in the litigants' favor. Those two actions are (1) malicious prosecution; and (2) abuse of process. Obviously statements made within the litigation context in a malicious prosecution action are admissible -- and likewise statement made in an abuse of process action are admissible. Because this case is a IIED action *Oren* does not apply. AOB 21-24.

As well, in this case, the Court directly instructed that actual litigation procedures, service of process, and the "results of litigation" considered to prove IIED, while *Oren* holds that statements made in litigation are admissible to show intent. *Oren* does not apply and it cannot correct the Court's error on the following instructions nor in the "intent" instruction on USDA procedures, described in § 11.

The Decision misses these critical distinctions.

The sua sponte instructions which violate this rule and *Oren* are:

(1) you can consider the *unlawful detainer three-day notice* as to "whether or not it was used in furtherance of a plan that did not involve litigation,"
2) you can consider whether or not the "*service of this [the 3-day] notice* was pursuant to an overall objective that was not related to litigation."
(3) you can consider *the results* of *[the unlawful detainer] "action* as bearing upon whether or not the defendants had the intention of committing or inflicting emotional distress as part of an overall plan." 612-14; AOB 56.

This new interpretations of *Oren* require litigants to carefully weigh whether or not serving papers, filing motions, undertaking investigations of the case, communicating with potential witnesses, and vigorously

pursuing the objectives of their lawsuit is worth the risk of that litigation tactics will be urged as the evidence to show "intent" in an IIED cross-complaint.

Appellant requests that the instruction to the jury be quoted or accurately described in the Decision and that the Court consider on rehearing this important issue of law and consider the double-edged sword this rule of law creates, which could open the litigation files of all attorneys defending tortious cross-complaints.

9. Power But Not the Right to Invoke Administrative Proceedings

The Decision does not document the Court's critical sua sponte instruction on the "power but not the right" to invoke USDA administrative remedies. The Court's first instruction came soon after the first witnesses took the stand. It said:

> MR. McALPIN: May we approach for a moment, Your Honor?
>
> THE COURT: No. That's what the ruling was. *That's the law. That's the law of this case*. Do they have the power to do it? Yes, they had the power. Were there procedures in effect for them do it? . Yes. Were they correct in doing it? Did they have the right to do it? No, they did not. To make sure – I want to make sure you're not confused on that issue. Thank you." CR 671; AOB 51-52.[28]

The Decision does not consider the effect of the full text of the instruction. In the full text, the court states *"that's the law, that's the law of this case"* – not *"that is the law of the contract trial."* A lay jury would never understand that

---

[28] The instruction on "power but not the right" was repeated twice with a limiting instruction that it was to show intent, which his discussed below.

"that's the law; the law of this case" means something other than "*that is the law of the case you are trying.*"

The word "right" is a word which laypersons understand to mean *privilege*. This is clear from BAJI instruction No. 12.78. The use of the word "right" to put the shares "in dispute" would more reasonably be understood by the jury to mean Appellants had no *privilege* to seek USDA administrative remedies.

The Decision misses that the questions were asked and argument made at trial that utilizing the USDA "in dispute" procedures formed the basis of IIED. CR 758, 604-605; 712. Mr. Greco was asked, at the IIED trial, questions about the USDA hearing about putting the subsidy shares "in dispute." CR 605.

A further instruction about Appellants' "right" to invoke USDA procedures to show "intent" to inflict emotional distress is at § 11 below. The Court's holding that the jury understood the "power *but not the right*" to apply only to contract is a new issue under which Appellant requests further briefing. Gov't Code § 68081.

10. Romero v. Herpin (LaApp. 1991) 579 So.2d 1218 is Inapposite

The Court's cite to *Romero v. Herpin* (LaApp. 1991) 579 So.2d 1218 shows a good deal of initiative. But it misses a very important distinction in *Romero*.

The landowner in *Romero* unilaterally (without a determination under USDA administrative remedies) refused to sign a USDA contract.

In this case, however, Appellants signed the contract, and John Greco received the first half of the 1998 farm subsidy payment on the property. CR 97, 990. Thereafter, *Appellants sought out United States Department of Agriculture administrative remedies, which were no where present in Romero.* AOB 2, 12. As the Decision states, Appellants contacted the USDA, and the USDA informed Appellants of USDA administrative remedies whereby farm subsidy shares

might, after the United States' government's review, be put in "in dispute." *The USDA informed Appellants that this procedure was available only after USDA investigation and a finding that a "valid dispute" exists.* As noted in the Decision, Appellants were given a copy of the USDA Handbook. (Ex. 13). The Exhibit shows (5th page of Exhibit under "Determining a Valid Dispute, page 5-25") that the USDA is required to review *the lease and other available evidence before allowing the contract shares to be put "in dispute."* It further requires that the USDA protect the interest of landowners and tenant farmers (¶ 252D (p. 5-20). It requires (under 255D "Documenting Dispute, p. 5-26) that the minutes include "all factors considered, including evidence reviewed, justification of how the decision was derived." It requires *the USDA the participants "shall be notified of the determination" and "shall be provided appeal rights."* The Grecos received this notice, as the Decision notes. Mr. Greco did not appeal. RT 711. At trial, Appellants requested judicial notice of these USDA Handbook provisions (CR 1542) and of the empowering statutes 44 USCS 3101.

It is under this distinction that both the breach of contract must be determined and the Court's instruction that the USDA administrative procedures could be used to show "intent" to inflict emotional distress, as described in § 11 below.

Romero is further distinguished from this case in that the tenant planted all of the "subsidized" acres but did not plant the unsubsidized acres. The dispute in this case was over the *unplanted, subsidized acres.* AOB 18.

The 1996 "Freedom to Farm" Act, allows farmers to farm or not to farm - the subsidy is the same. With farm subsidies having been doubled in recent years, a couple can earn $160,000 farming multiple farms. A farmer can make as much money leaving the ground idle as farming. RT 328. There is therefore an incentive not to farm, which the USDA considered but the Courts did not. The issue before the Court here was: Is it fair for a tenant farmer to receive subsidies on

farmland when he does no work and pays no rent because he has a crop share lease.

11. Question of Law: Can United States Administrative Remedies be Used to Show "Intent" to Infliction Emotional Distress?

The Decision determines that the "power but not the right" instruction only apply to contract. But it misses that the Court instructed that USDA administrative remedies could be considered to show "intent":

> "And so the fact that that remains, FSA proceedings remain, is relevant on the issue of intent only. . . . And I think the only relevant issue is that they did not settle as a result of this." CR 943

How then, under this instruction, could the jury have understood any of the "power but not the right" sua sponte instructions to apply only to contract?

The Court's instruction that FSA proceedings can be use to show "intent" in the IIED trial, when considered with the Decision's determination that the FSA proceedings were but a breach, punishes for bad faith breach of contract in violation of *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85 (1995).

As discussed in § 8 above *Oren* cannot save this erroneous instruction. Appellants were privileged to have employed the administrative remedy. It cannot be used to show "intent," as the court instructed. The instruction conflicts with United States administrative law and it violates Appellants constitutional rights.

Appellants request publication of this rule so that they will not be the only individuals subjected to it.

Appellants request that the Decision be corrected to document the "intent" instruction on USDA administrative proceedings and request rehearing as an important issue of law is misstated in the Decision.

CONCLUSION

In the end no "conduct" was shown at trial. Only statement were admitted into evidence though the defamation cause of action was dismissed. Appellants were ambushed and without witnesses at trial – just as predicted in the motion for judgment on the pleadings and the Petition for Writ of Mandate. Evidence was admitted over objection, which was clearly inadmissible for the purpose of proving Respondents' IIED action.

Appellants did finally learned what the Greco's action was about. They learned at trial. It was about the unplead attorney letters, filing an unlawful detainer action, seeking administrative remedies, and an investigatory letter.

Appellants suffered a trial based on unplead litigation tactics that they were helpless to defend. That was the Court's rule. They filled the Court file with their defensive motions. Their constitutional rights were trampled – and no one cared. No one cared even about the constitutional rights of innocent, non-lawyer parties who suffered this devastating judgment – in this trial where Respondent was allowed to prove his IIED cross-claim based on the litigation itself.

Respectfully submitted,

/s/ Linda Foster
LINDA FOSTER

Appendix G
In Limine "Points and Authorities"
Rule (i)(vi)

FILED
Superior Court of California
County of Placer
DEC 13 1999
Carl DePietro

CROSS-DEFENDANTS' MOTIONS IN LIMINE
Trial Date: November 30, 1999
The Honorable James Garbolino

Cross-defendants request that the Court make a preliminary finding under Evidence Code §402, outside the presence of the jury, in order to determine the admissibility of the Cross-complainants' ("Greco) evidence, and whether it comes under the Civil Code §47(b)'s *Absolute Litigation (Judicial) Privilege*, which applies to all torts except malicious prosecution.

Emotional Distress Damages Are Not Available for Filing A Lawsuit or Implementing Procedures Under an Action.

Greco makes it clear that he intends to present evidence that Cross-complainants' undertook litigation procedures and that this caused him emotional distress. Greco makes this showing by his response to the Summary Adjudication Motion on file in this action, where, under the heading "ADDITIONAL FACTS RELATED TO CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS," Greco asserts that:

(1) writing a demand letter preceding litigation (See Exhibit "Ex." A, Undisputed Fact "UF" No. 35 and 36), and

(2) implementing procedures under this action (Ex. A, UF 39 and 40) constitute grounds for intentional infliction of emotional distress.

Cross-complainants further believe that the Grecos intend to present evidence of cross-complainants' investigative contacts with individuals, the names of whom this Court issued a discovery order compelling Greco to produce. (Ex. B).

Greco is attempting to prosecute an action, upon the factual basis that cross-defendants filed a lawsuit against him. The only time such is allowed is in a malicious prosecution action. Not only has malicious prosecution not been plead, but he is missing the most important element of that cause of action – an action must be terminated in his favor.

Civil Code § 47(b)'s litigation privilege is applicable to all torts, save malicious prosecution. *Silberg v. Anderson* 50 Cal. 3d 205, 211. The litigation privilege allows attorneys to zealously protect their clients' interests without fear of retribution by opposing litigants and has been given broad scope. *Silberg v. Anderson* (1990) 50 Cal.3d 205, 213-214. The litigation privilege bars an action for intentional infliction of mental distress. *Kachig v. Boothe,* (1971) 22 Cal.App.3d 626; *Lerette v. Dean Witter,* (1976) 60 Cal.App.3d 573; *Pettitt v. Levy,* (1972) 28 Cal.App.3d 484; and *Scott v. McDonnell Douglas,* (1974) 37 Cal.App.3d 277).

Investigations undertaken in attempt to obtain evidence which might be admissible at trial are protected by the litigation privilege, as well. Rothman v Jackson (1996, 2nd Dist) 49 Cal App 4th 1134; ITT Telecom Products Corp. v Dooley (1989, 6th Dist) 214 Cal App 3d 307

Aronson v. Kinsella, 58 Cal. App. 4th 254 (1997) makes it clear that the *absolute litigation privilege* applies to attorney demand letters.

If the publication has a reasonable relation to the action and is permitted by law, the *absolute privilege* attaches. *Rothman v. Jackson,* 49 Cal. App. 4th 1134 (1996) 49 Cal. App. 4th 1134, 1142.

Greco's attempts to show evidence that litigation was commenced against him will not, in any way, support his claim. Fortunately, for the already overburdened court system, the filing and pursuing of a lawsuit is not conduct upon which a lawsuit can be based. To allow Greco to go over the legal procedures, for the admitted purpose of showing that legal procedures were undertaken, serves no purpose but to prejudice the jury.

Cross-defendants respectfully request that the Court prevent Greco and his attorney from admitting evidence or commenting upon the following:

1. Attorney demand letter proceeding litigation by a few days;
2. Evidence of litigation procedures and court hearings unless the such has valid purpose for admission into evidence, other than to show Greco might have suffered emotional distress because of court proceedings;
3. Making any comments during examination, opening or closing arguments, about the litigation which have no purpose other than to call attention to the fact that this matter is being litigation and thereby show Greco might have suffered emotional distress because of court proceedings.
4. Investigations and discovery in the lawsuit, including but not limited to, contacts with individuals whose names this Court ordered that Greco produce.

Respectfully submitted,

/s/ Robert L. McAlpin
ROBERT L. McALPIN

APPENDIX H
Letters
Rule (i)(vi)

LINDA SMART-FOSTER
Attorney At Law
P.O. Box 994
Lincoln, California 95648

March 3, 1998

John N. Greco
8501 Valley Road
Lincoln, CA 95648

Re: Lease Agreement, dated December 1, 1997

Between Louise W. Surmon and John N. Greco

Dear Mr. Greco:

I represent Guy W. Foster, myself, David Fjelline and Theresa Fjelline ("Lessors") in connection with the property we recently acquired at 4221 N. Dowd Road, Lincoln, California and the lease agreement between you and the former owner, Louise W. Surmon, on 97.3 acres of property on that land (the "Lease").

As you are aware, a dispute has arisen regarding the disposition of the payments under the Lease which are to be received from the Farm Services Agency on this property. The one-page lease is completely devoid of any provision as to who is entitled to these payments.

The exact words in the Lease regarding the consideration for the lease are as follows:

> "The lessor shall receive 10% of the gross procedes [sic] from all crops grown on the land out of which he will pay for the drying and storage of his/her share of the crop."

"Procedes" is not a word. However, assuming you meant "proceeds," the key words would be "gross proceeds from all crops grown on the land." "Gross proceeds from all

crops grown on the land" would not include moneys you receive from Farm Services Agency because such is not a "crop grown on the land." The words "out of which he will pay for the drying and storage of his/her share of the crop" makes it even clearer that this provision is for the crop – not the government payments.

My understanding is that you assert that due to custom and trade usage, the words "gross proceeds from all crops grown on the land" does mean government program payments. We respond to this assertion as follows:

First, Farm Services Agency has provided us with a sample lease agreement, and that lease agreement contains explicit provisions regarding government program payments. I understand that you are on an advisory committee which reviews farm leases and advises regarding the fairness of such leases. As such, you more than almost anyone else know that prudence would dictated that government program payments be provided for in the lease. We believe that you used that knowledge to take advantage of our predecessor, Mrs. Surmon, an 83 year old widow.

Second, share of crop and share of government program payments are not necessarily equal. Farm Services has informed us of this fact. I am sure that you know it. Therefore, particularly since you knew you were dealing with individuals who were not farmers, the Lease should have specifically dealt with the government payments. Otherwise, you are not entitled to them.

Third, a party to a contract not engaged in the industry is not bound by a custom or usage unless the party had actual knowledge of it, or it is so general or well-known in the community as to give rise to the presumption of that knowledge. As you know the Lessors are not engaged in the farming industry.

Even under an interpretation most favorable to you, the rent provision is, at best, ambiguous. In interpreting

ambiguous provision of a contract, the provision is construed against the party who caused the uncertainty. As the draftsman of the lease, the person causing the uncertainty would be you.

The Lease is deficient in several other respects. You have leased 97.3 acres of farmland, while Lessors own 156 acres at 4221 N. Dowd Road, Lincoln, California. Unless we can look to some outside source to interpret this ambiguity, which acres you have leased is unclear and therefore unenforceable. Lessors wish to farm a portion of the farm as well and they need water for this purpose. How is the water to be divided? Or if the well is actually on the portion you did not lease, do you have any rights to water?

We are not hereby demanding that you cease farming the property. Please do not interpret this letter as an attempt to rescind or repudiate the Lease. What we intend to do is to institute an action against you to obtain a determination of the Court as to who gets the government program payments and who has rights to the water. If we win, we will enforce our judgment against your assets.

As you know, we are interested in cashing you out in exchange for a cancellation of the Lease. The most that we can offer is $4,000, with you returning the difference between the $4,000 and the government payment you already received. This is our final settlement offer. If we do not come to an agreement to cancel the lease in the next few days, suit will be filed against you. Please either contact me or Dave Fjelline by March 6 at 11:00 a.m.

Very truly yours,

/s/ Linda Smart-Foster
LINDA SMART-FOSTER

LINDA SMART-FOSTER
Attorney At Law
P.O. Box 994
Lincoln, California 95648

March 11, 1998

VIA FACSIMILE - 530/533-0197

Paul Minasian, Esq.
Minasian Law Firm
P. O. Box 1679
Oroville, CA 95965

Re: Fjelline v. Greco

Dear Mr. Minasian:

As you suggested, I contacted David Shad and Verna Gordon as soon as we got off the telephone yesterday. We further recontacted the Farm Service Agency office in Auburn. Those who work at Farm Service Agency indicate that the Federal Agriculture Improvement and Reform Act of 1996 (the "Act") does not require that government program payments be split in the same share as the percent of crop under a crop share lease. They further indicate that under the Act, it is common for them to approve leases where share of crop and share of government program payments is not the same.

Please let me know if you still contend that a share of crop percent controls share of government program payment. Also, please provide me with your authority for such position.

The theory you expressed regarding interference with contractual relations was unique. Mr. Fjelline and Mr. Foster did nothing more than submit an offer on a parcel of property making the offer contingent upon the farm lease being not more than one year. Mrs. Surmon, through her real estate agent Jay Holland, then attempted to reduce the farm lease to one year. These facts would not support a cause of action for interference with contractual relations. If your complaint

Paul Minasian
March 11, 1998

survives demurrer, it will not survive a summary judgment motion.

At any rate, we are filing the complaint today. We are only at this time seeking declaratory relief. Though I have drafted causes of action regarding conflict of interest and fraud, we have elected to investigate the matters further prior to amending the complaint.

The offer remains open to cancel the lease for the sum of $4,000. However, it may not remain open too much longer.

Very truly yours,

/s/ Linda Smart-Foster
LINDA SMART-FOSTER

THREE-DAY NOTICE TO PERFORM COVENANT OR QUIT

To: John N. Greco
8501 Valley Road
Lincoln, CA 95648

TAKE NOTICE that pursuant to the provisions of the attached lease, which is incorporated herein by reference, under which you hold possession of Farm # 385, at 4221 N. Dowd Road, Lincoln, California, we shall elect to terminate said lease as of April 21, 1998, due to your announced refusal to farm the property, which farming is required by your covenant in the lease to pay "10% of the gross procedes from all crops grown on the land." You must commence performance of your duty to farm the property or give us assurance that you will farm the property on or before April 21, 1998, or the lease shall then be terminated and you shall be required to deliver up possession of the property.

Date: April 18, 1998

/s/Guy W. Foster
GUY W. FOSTER, on behalf of
David Fjelline, Teresa Fjelline,
Guy W. Foster and Linda Foster

LINDA SMART-FOSTER
Attorney At Law
P.O. Box 994
Lincoln, California 95648

September 5, 1998

Paul Minasian, Esq.
Minasian Law Firm
P. O. Box 1679
Oroville, CA 95965

Re: Fjelline v. Greco

Dear Mr. Minasian:

You asked after the August 25 hearing, if we were really going to "spend five days in trial" on this case. You also asked if my husband was "willing to risk his fortune over this?" (Incidently, his "fortune," is more accurately described as his life savings, invested in this farm, which was accumulated as a result of hard work and a profoundly frugal life style.) It is the defamation action to which you allude by your statement, "risk his fortune" which will cause this trial to be a five day jury trial – and yes, I certainly am willing to spend five days and any amount of preparation time it takes to defend my husband and his partner against this unwarranted defamation action.

The filing of the defamation action escalated this uncomplicated declaratory relief action into something much more than it should have been. And I might add much more costly to all parties than it should have been. If the action had been left as just that, a declaratory relief action, we could have had a court trial and received a quick and simple determination on the terms of the lease. However, at this point, we must take this matter very, very seriously. We must commence discovery and leave no stone unturned.

You, in essence, are asking us to cower and accept an inappropriately low settlement of $3,296 of the PFC payment

because of the ill-founded defamation and intentional infliction of emotional distress actions. We will not do that. We are the owners of the property; Mr. Greco has contributed nothing.

Among other evidence volunteered by community members, we are informed that Mr. Greco has been bragging about how he got approximately $4,000 from PG&E because their truck made some ruts in the ground he was farming. We understand he claimed damage to his truck and also personal injuries. PG&E settled rather than litigate the matter. We will not be intimated by the Grecos' litigious propensities.

At trial, Mr. Greco's business practices will be fully exposed. Mr. Greco is already known as a hot-headed, hard to deal with individual. If Mr. Greco intends to stay in business, he needs to give some serious thought to how this lawsuit is further damaging his reputation in the community. If Mr. Greco loses the lawsuit (or even if he wins), he may find few, if any, landowners who will give him the opportunity to farm.

We also intend to present evidence regarding Mr. Greco's argumentative nature by subpenaing individuals with whom he has engaged in altercations. By this evidence we will prove that Mr. Greco's emotional distress, if any there was, is a cumulative result of his combative behavior.

We reiterate our settlement offer of $4,000 to the Grecos. Since the Grecos have refused to farm the property, the remaining PFC payments should go to us. Mr. Greco has done nothing to earn the PFC payments, save for plowing 36.6 acres of ground once – at most a couple of day's work. Because we are about to undertake further discovery on this case and will have to expend time and money in that effort, we are not keeping the offer open indefinitely. The offer shall remain open until September 30, 1998.

Very truly yours,
/s/ Linda Smart-Foster
LINDA SMART-FOSTER

LINDA SMART-FOSTER
Attorney At Law
P.O. Box 994
Lincoln, California 95648

January 8, 199[9][1]

Herman D. Bess
390 S. Dowd Road
Lincoln, CA 95648

Re: Fjelline v. Greco

Dear Mr. Bess:

In March 1998, we requested that the Placer County Superior Court tell us how the lease John Greco had on a piece of property, my husband and his partner had just purchased, should be interpreted. This is called a declaratory relief action. Mr. Greco immediately sued us for defamation of character and intentional infliction of emotional distress. He is requesting $100,000 in damages.

In connection with that lawsuit, we are attempting to gather information about Mr. Greco's other farm leases.

There are just a few questions we would like to ask, which are on the attached questionnaire. We would very much appreciate your answering these questions and returning the questionnaire to us as soon as you can. If you have any question, please feel free to call me between 7:30 - 9:00 p.m. We are not trying to involve you in our lawsuit but merely trying to gather facts about Mr. Greco's farming practices.

Very truly yours,

/s/ Linda Smart-Foster
LINDA SMART-FOSTER

[1] The letter actually showed "1998," but testimony showed the year was misstated and that it was actually dated "1999."

Questionnaire to Elderly Landowners

1. Do you know how much the total government farm subsidies were on your property in 1998?

Yes ☐ No ☐

2. Do you know that a supplemental government farm subsidy, increasing the farm subsidies in 1998 by an additional 49%, was awarded in 1998?

Yes ☐ No ☐

3. Do you know if the income you received on your property in 1998 exceeded the total government farm subsidies?

Yes ☐ No ☐

4. Are you aware that under the current Farm Bill, effective 1996 through 2002, you do not have to farm the property to collect government farm subsidies?

Yes ☐ No ☐

6. Are you aware that when a lease expires on your farm property, and you maintain control of it, you can collect the entirety of that government farm subsidy without farming?

Yes ☐ No ☐

7. Did John Greco raise a crop on your farm in 1998?

Yes ☐ No ☐

8. Did John Greco farm all the acres he had rented from you in 1998?

Yes ☐ No ☐

9. Do you know if John Greco collected any crop insurance for not farming any part of your property in 1998?

Yes ☐ No ☐

_____

Herman D. Bess

Appendix I
Requested "Knowing Falsity" Instruction under Rule (i)(vi)

Cross-Defendants' Instruction No. __
[Public Official/Figure – Public Matters- Essential Elements]

The essential elements of a claim for defamation by libel/slander are:

1. The Cross-defendants by writing or orally made a defamatory statement about the Cross-complainants;
2. The Cross-defendants published the defamatory statement;
3. The Cross-defendants, at the time of the publication,
   a. Knew that the statement was false and defamed Cross-complainants, or
   b. Published the statement in reckless disregard of whether the matter was false and defamed the cross-complainants
4. Either the publication caused Cross-complainants to suffer special damages, or the statement was defamatory on its face.

Reckless disregard for whether the matters was false and defamed Cross-complainants means that the Cross-defendants must have had serious doubts about the truthfulness of the statement at the time of publication.

SOURCE: 7.04

Given: ____
Refused: ____
Modified: ____
Withdrawn: ____

_____
Judge of the Superior Court

Appendix J
Federal Legal Authorities under Rule 14 (1)(f)

A. Constitution of the United States of America

(1) First Amendment ("Petition for Grievance" clause):

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

(2) The Fourteenth Amendment ("Due Process" clause):

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(3) Article VI (the "Supremacy Clause"):

> "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

B. Applicable Provisions of Agricultural Market Transition Act Subpart C--Financial Considerations Including Sharing Production Flexibility Payments

(1) Code of Federal Regulations:

7 CFR § 1412.302 (b). . . . If all producers on the farm have not signed the contract designating payment shares according to this paragraph, then no producers will be eligible for a payment for that farm for that fiscal year.

7 CFR § 1412.303 Sharing of contract payments. (a) Each eligible producer on a farm shall be given the opportunity to enroll in a contract and receive contract payments determined fair and equitable as agreed to by the producers on the farm and approved by the county committee.

(1) Producers must provide a copy of their written lease to the county committee, and, in the absence of a written lease, must provide to the county committee a complete written description of the terms and conditions of any oral agreement or lease.

(2) A lease will be considered a cash lease if the lease provides for only a guaranteed sum certain cash payment, or a fixed quantity of the crop (for example, cash, pounds, or bushels per acre).

(3) If a lease contains provisions that require the payment of rent on the basis of the amount of crop produced or the proceeds derived from the crop, or the interest such producer would have had if the crop had been produced, or combination thereof, such agreement shall be considered to be a share lease.

(4) Beginning on October 1, 1998, for years in which payment shares had not been designated prior to October 23, 1997, a producer's lease, including a lease which provides for the greater of a guaranteed amount or share of the crop or crop proceeds, shall be considered a share lease if the lease provides for both:

(i) A guaranteed amount such as a fixed dollar amount or quantity; and

(ii) A share of the crop proceeds.

(5) If the lease is a cash lease, the landlord is not eligible for a contract payment.

(6) A lease that the county committee determined to be a cash lease under § 1412.303 as contained in the 7 CFR, parts 1200 to 1499, edition revised as of January 1, 1997, will be considered a cash lease for the years in which payment shares were designated if, prior to October 23, 1997:

(i) The designation of shares was executed; and

(ii) The county committee was provided a copy of the lease applicable for the designated years.

(b) When contract acreage is leased on a share basis, neither the landlord nor the tenant shall receive 100 percent of the contract payment for the farm.

(1) A landowner may receive up to 100 percent of the contract payment if no lease exists with respect to the contract acreage. The leasing of grazing or haying privileges is not considered cash leasing.

(2) [Reserved]

(c) The county committee shall approve a contract for enrollment and approve the division of payment when all of the following apply:

(1) The landowners, tenants and sharecroppers sign the contract and agree to the payment shares shown on the contract;

(2) The county committee determines that the interests of tenants and sharecroppers are being protected; and

(3) That the division of payments is not done in a manner to circumvent the provisions of part 1400 of this chapter.

7 CFR § 1412.304 (b) Notwithstanding the provisions set forth at § 1412.302(c), if the landowners, tenants and sharecroppers on a farm fail to reach an agreement

regarding the division of contract payments for a fiscal year, the county committee shall make the payment at a later date if all persons eligible to receive a share of the contract payment have executed a contract not later than August 1 of the applicable fiscal year and subsequently agree to the division of contract payment.

C. ***Management Directives*, United States Department of Agriculture Handbook, FSA 1-PF Amend.:**

§ 255 - Division of Payment Disputes:

B. PFC Payment Shares Dispute. PFC payment shares [farm subsidy payment shares][1] are considered in dispute when there is a disagreement on payment shares, and either of the following applies:

- Available evidence does not show which producers should share in the PFC payment
- Available evidence shows which producers should share in the PFC payment; however, the evidence does not indicate what the PFC payments shares should be.

C. Determining Valid Disputes. There are some cases where it is obvious that PFC payment shares are not in dispute. To determine whether a valid PFC payment shares dispute exists, COC [USDA County Committee] shall.

- determine whether the requirements in subparagraph 252 D have been met –except for agreeing on PFC payment shares
- determine whether available evidence supports who should shares in PFC payment on a farm

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[1] Some minor parenthetical explanations are provided in brackets "[ ]." These bracketed words are not part of the Management Directives but are provided by counsel so that the reader can understand some abbreviations used in these Directives.

- determine whether the available evidence supports what the PFC payment shares should be
- review lease agreements and use them as a guide in determining who should share in the PFC payment on a farm and what the PFC payment shares should be, unless the lease agreement is in conflict with other provisions of this part

Note: Lease agreements, which specifically provide for who is to shares in the PFC payment and what the PFC payment shares should be, shall be used as a basis for dividing PFC payments, unless the lease agreement is in conflict with other provisions of this part.

- Review past history to determine how payments were shared in previous years
- Compare previous year's rental agreement to the current year's rental agreement to determine whether rental rates are similar or have changed for the type of acreage being rented.

  Example: Owner A rented 50 acres of FSN 2 to Producer B in 1996 for $50 per acres. Owner A retained enough eligible land to support the corresponding contract acreage and received 100 percent of the 1996 FY PFC payment. Owner rents 50 acres of FSN 2 to Producer C in 1997 for $50 per acres. Owner A retains enough eligible land to support the corresponding contract acreage. Past payment history indicates that tenants on the farm have no shared in previous years' payments and Owner A has received 100 percent or previous years' payments. Producer C is paying the same or similar rent for FY 1997 and is not required to share in the PFC payments for FY 1997.

Disputes are considered to be valid when the available evidence supports who should share in the PFC payments, but does not support what the PFC payment shares should be.

Do not consider to be a valid dispute when:

- it is obvious that the available evidence supports who should shares in the PFC payment and what the PFC payment shares should be
- all provisions of this part are met.

D. Documenting Dispute Determinations.

COC shall thoroughly document the review and determination in the COC minutes, and include the following:

- all factors considered, including evidence reviewed
- justification of how the decision was derived.

Producers shall be:

- notified of the determination
- *provided appeal rights*

Appendix K
Issues Raised in Lower Courts (Rulings Discussed in Text of Petition under Rule 14 (1)(g)

A. "Petition for Grievance/Due Process" – Trial Court:

1. Petitioners' Answer to Respondents' Complaint (filed 8/17/98):

Petitioners' answer contained the following affirmative defense:

> "As to any statements contained in paragraph 15 . . . the statements are *protected as statements made in the course of both judicial and quasi-judicial proceedings* . . . are *constitutionally* privileged in that they were made regarding a public official and were made without cross-defendants' knowledge of their falsity or reckless disregard for the truth." Court Record ("CR") 37-38. (As explained in the Petition, the litigation privilege or the "judicial and quasi-judicial proceedings" privilege is partially based upon the First Amendment "petition for grievance" and the Fourteenth Amendment "due process" clauses.)

2. Motion for Summary Judgment (filed 1/6/99):

In response to each piece of evidence, Respondents presented, to which the First Amendments' "petition for grievance" and "due process" clauses applied, Petitioners responded the "*litigation privilege*" barred Respondents' cross-claim for mental suffering. CR 821-825. (As explained in the text of the Petition, the "litigation privilege" is partially based on First Amendment "petition for grievance" and the Fourteenth Amendment "due process" clauses.)

3. Motion in Limine (filed 6/16/99):

The *"litigation privilege"* was raised repeatedly in this motion. Motion is completely reprinted at 107A - 109A of this Appendix. CR 1501-1503.

4. Motion for a New Trial

The motion for a new trial, seeking reversal of the mental suffering judgment, states the following:

> *"California Teachers Ass'n v. State,* 20 Cal. 4th 327 (1999), *emphasizes the relationship between the constitutional right of access to the courts and the litigation privilege*:
>
> 'We have emphasized the importance of free access to the courts as an aspect of the *First Amendment right of petition*. Our unanimous decision in *Pacific Gas & Electric Co. v. Bear Stearns & Co.,* 50 Cal. 3d at pages 1130-1137 . . . The policy of encouraging free access to the courts is so important that the litigation privilege extends . . . to any action except one for malicious prosecution.'" CR 1875
>
> *"Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 430, fn. 5 (1982), points out that the litigation privilege protects our *'constitutional right of access to the courts for all persons, without regard to the type of relief sought.'* Accordingly, the litigation privilege must be zealously protected." CR 1875-76.

B. "Petition for Grievance/Due Process"-Court of Appeal:

Petitioners' Opening Brief contains the following:

> "[T]he court's determination that the Fosters and Fjellines breached their lease when they put the subsidy shares in dispute was contrary to federal law and *deprived appellants of constitutional rights of due process and to petition government*; . . . (3) the court's refusal to dismiss the cross-complaint was reversible error." Appellants' Opening Brief ("AOB") 2.

"As a matter of federal law, the Fosters' and Fjellines' conduct was privileged and the *court's decision to the contrary deprived them of their constitutional rights to due process and to petition government.*" AOB 22.

"The court's decision punishing appellants for seeking administrative redress *deprived them of constitutional rights as well. The Fourteenth Amendment guaranty of procedural due process - a meaningful opportunity to be heard - is an aspect of the constitutional right of access to the courts for all persons.* An individual's right of access to the courts cannot be impaired, either directly or indirectly, by retaliation for filing lawsuits. *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118 (1990). . . . This right of access does not depend on the form of relief sought and extends to the right to petition administrative tribunals. *Id.*" AOB 28

"The First Amendment right to petition government also protects the basic act of filing litigation or otherwise seeking administrative relief. *Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 22 (1995) (citing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *see generally, Wolfgram v. Wells Fargo Bank*, 53 Cal. App. 4th 43, 52 (1997)." AOB 28.

C. ***"Petition for Grievance/Due Process"- California Supreme Court:***

1. Petitions For Review (filed 6/14/2002):

The Petition for Review to the California Supreme Court contained the following:

"These instructions to the jury are akin to instructing that citizens do not have the right to file a lawsuit in our courts, as administrative remedies come under the same *Constitutional right to seek redress.*" Petition for Review Foster ("PRF") 4.

"The trial Court found that a USDA 'valid dispute' Determination . . . is contrary to federal law. It cripples the United States governments' administrative "valid dispute" procedures and *deprives Appellants of constitutional rights of due process and to petition government for grievance.*" PFR 4

"Review would protect due process and First Amendment rights implicated when tort damages are based on instituting and pursuing litigation. *See Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1131 (1990); *Silberg v. Anderson*, 50 Cal. 3d 205, 212 (1990) *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 875 (1989); *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1169 (1986)." Petition for Review ("PR") 3.

"The holding *implicates due process and First Amendment rights* to the extent that tort damages are based on evidence that appellants filed motions, appeals and other legal proceedings during the course of litigation. *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1131 (1990); *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001)." PR 10.

D. Federal Supremacy – Trial Court:

1. Petitioners' Answer to Respondents' Complaint – Trial Court (filed 8/17/98):

Petitioners' Answer to Respondents' mental suffering cross-claim contains the following defenses:

"Cross-complaints are entitled to no portion of the government subsidy payments . . . *because cross-complainants have refused to comply with the decisions, rules and regulations of the United States Department of Agriculture . . .*" CR 37.

2. Motion in Limine at the Contract Trial - Trial Court (filed 6/16/99):

The Motion in Limine at the Contract Trial contains the following statements:

> ***"State Court Cannot Interpret Nor Enforce USDA Subsidy Payment Contracts Because The Federal Government Completely Occupies the Field of Farm Subsidies***
>
> If the federal law does not clearly state an intent to preempt state law, the state law will be upheld *"unless it conflicts with federal law or would frustrate the federal scheme,* or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." *Malone v. White Motor Corp. (1978) 435 U.S. 497, 504. . . .*
>
> Additionally as stated by USDA Counsel, the USDA will not follow any directive of the state court regarding government subsidy payments under *15 USC 714(B)* which provides:
>
> "State and local regulatory laws or rules shall not be applicable with respect to contracts or agreements of the Corporation or the parties thereto to the extent that such contracts or agreements provide that such laws or rules shall not be applicable, or to the extent that such laws or rules are inconsistent with such contracts or agreements."
>
> Exhaustion of Administrative Remedies.
>
> The USDA has certain procedures they must follow in order to come to the determination that subsidy payments shares can be put "in dispute." Attached is under Tab E is the USDA Handbook (published by the United States Department of Agriculture under the delegating authority of 7 CR Part 2) showing such procedures. The defendant had a right of appeal on the

USDA's *"in dispute"* determination. *Because the defendants did not appeal the "in dispute" determination, they have not exhausted their administrative remedies."*

(The foregoing document attached USDA Management Directives USDA, 1PF Amend. 255 B-D as fully reprinted at Appendix 124A-126A herein.) CR 979-982.

Petitioners requested judicial notice citing USDA Management Directives USDA Handbook, 1PF Amend. 255 B-D on June 16, 1999, September 28, 1999, and December 13, 1999. CR 851; 1354, 1542.

3. Pretrial Motions – Trial Court:

(a) Motion for Summary Adjudication (1/6/99):

In response to assertions that putting the farm subsidy shares "in dispute" was grounds for Respondents' mental suffering cross-claim, Petitioners responded: *"Fjelline/Foster had no authority to put the payment shares in dispute, until the USDA Farm Service Agency ("FSA") County Committee determined that a valid dispute exists."* CR 822.

Motion for Summary Judgment Reply (filed 1/6/99)

The motion for summary judgment reply contained the following:

"Greco, in his Proposed Disputed Fact No. 37, states that disputing the division of the subsidy payment, as allowed by FSA's handbook, Farm Service Agency 1-PF Amend. 11 paragraph 255B & C[2], is an outrageous act entitling Greco to emotional distress damages.

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[2] "PFC payment shares are considered in dispute when there is a disagreement on payment shares, and either of the following applies:. . .

Doing what one has an absolute to do under the law cannot give rise to a tort claim. Dryden v. Tri-Valley Growers, 65 Cal. App. 3d 990." CR 838-839.

(b) Motion for Judgment on the Pleadings (filed 9/27/99):

The Motion for Judgment on the Pleadings contains the following:

"Cross-complainants are thus left with an attempt to prove that an act by cross-defendants, which has been reviewed, documented and approved by the United States Department of Agriculture FSA , constitutes *outrageous conduct... Cross-defendants had a right, under the procedures defined by the U.S.D.A., to request that the farm subsidy payment shares be put in dispute.... Obviously, taking advantage of one's rights under the rules of our United States government is not an atrocious and utterly intolerable act."* CR 1327-1329.

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available evidence shows which producers should share in the PFC payments; however, *the evidence does not indicate what the PFC payment shares should be."*

...

"There are some cases where it is obvious that PFC [farm subsidy] payment shares are not in dispute. *To determine whether a valid PFC payment share dispute exists,* COC's shall:"[2]

...

Review lease agreements and use them as a guide in determining who should share in the PFC payment on the farm and what the PFC payment shares should be, unless the lease agreement is in conflict with other provisions of this part."

E. Federal Supremacy - Court of Appeal:

Petitioners' Opening Brief (filed 12/29/00) Claims Federal Supremacy:

Petitioners' Opening Brief contained the following:

"The court punished appellants for exercising rights accorded to them by federal statute. Federal law governing Production Flexibility Contract payments specifically authorized the actions taken by the appellants in disputing Greco's share claim. *Federal law trumps inconsistent state law. 15 U.S.C. § 714b(g).*" AOB 24.

"The trial court's decision that the plaintiffs had the 'power but not the right' to petition to the County's FSA Committee under the 1996 Farm Bill is erroneous as a matter of law. *It deprived the appellants of the benefits of the federal administrative procedure that is the exclusive determinant of government contract fairness.*" AOB 28.

This USDA program is administered by the Commodity Credit Corporation (CCC)[3]. *With respect to the CCC's authority, 15 U.S.C. § 714b(g) (general powers) provides that federal law supersedes inconsistent state law*: AOB 25.

15 U.S.C. § 714b(g) (*state law shall not be applied to Commodity Credit Corporation contracts, if such laws are inconsistent with federal law*). AOB 24.

"Disputes are considered to be valid when the available evidence supports who should share in the PFC payment, but does not support what the PFC payment shares should be. Ex. 13, pages 5-25, 5-26." Citing Management Directives 1 PF Amend. 252C. AOB 15

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[3] Farm Service Agency and the Commodity Credit Corporation are both sub-agencies of the United States Department of Agriculture and both deal in the administration of farm subsidy contracts, with separate responsibilities. (fn not in original text.)

"The procedure calls for the subsidy to be paid upon the parties' agreement *and* the county committee's determination that the parties' agreement is fair to both landlord and tenant. 7 CFR § 1412.303(a)." Appellants' Reply Brief ("ARB") 6

F ***Federal Supremacy – California Supreme Court:***

Petitions For Review (filed 6/14/2002):

Petitioners' Petition for Review to the California Supreme Court contained the following:

> *"As a matter of federal statutory and constitutional law,* appellants had not only the power, but the absolutely protected right to put their crop subsidy shares in dispute as the condition precedent to resolution of a dispute determined by the FSA to be valid. . . ." PR 12.
>
> "As the opinion recognized, the dispute was determined by the FSA to be valid. (Slip op. p. 7) (RT 217-219; Exs. 7, 14). *Under the federal law only the FSA may determine whether the crop subsidy split in the PFC is fair both to tenant and to landlord* (7 CFR § 1412.303(a); *see also* 7 U.S.C. § 7214(g)). However, under federal law, if the dispute is determined to be valid, the FSA withholds the crop subsidy until the dispute is resolved. (Ex. 13 USDA Handbook pp. 5-20, 5-25, 5-26, 5-28)." PR 13.
>
> "In this case, the trial Court found that a USDA "valid dispute" Determination under their administrative procedures was a breach of contract. *The Court's ruling is contrary to federal law. It cripples the United States governments' administrative "valid dispute" procedures and deprives Appellants of constitutional rights of due process and to petition government for grievance."* RPF 4.